United States Court of Appeals

for the Second Circuit

APPENDIX

75-7127

United States Court of Appeals

FOR THE SECOND CIRCUIT

JACKSON O. KING,

Plaintiff-Appellee,

—against—

DEUTSCHE DAMPFS-GES,

Defendant and Third-Party Plaintiff-Appellee-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO. INC. and COURT CARPENTRY & MARINE CONTRACTING COMPANY,

Third-Party Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

(Volume II—Pages 288a to 591a)

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UNITED STATES COURT OF APPEALS
FILED
MAR 24 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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THE COURT: All right, will counsel approach the bench.

(At the side bar.)

THE COURT: Are there any motions at the end of the plaintiff's case?

MR. MOLANPHY: Yes.

At this time the plaintiff having rested the defendant and third-party plaintiff shipowner now moves to dismiss the one count in the complaint, that of unseaworthiness, on the grounds that there has been a failure to establish a prima facie case.

THE COURT: That motion is denied.

Any other motions?

MR. TESTA: I join in the shipowner's motion, your Honor.

MR. HOCKETT: So does ITO.

MR. MOLANPHY: I also move for a directed verdict on the issue of the plaintiff's contributory negligence.

THE COURT: That motion is denied.

MR. HOCKETT: Again ITO joins with the shipowner's motion.

MR. TESTA: I do not join in that motion, your Honor.

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THE COURT: Any other motions?

MR. SERGI: No motions.

THE COURT: All right.

Now, Mr. Molanphy, are you ready to proceed with your case?

MR. MOLANPHY: My case, your Honor, consists of reading some interrogatories and some answers to interrogatories and I would ask your Honor to instruct the jury as to just what this means.

THE COURT: Yes.

MR. MOLANPHY: Your Honor, I looked through my trial bag and I found a slip sheet that I had brought appropo of another issue, namely the amount of proof that the plaintiff has to put in, but I did notice in reading it just now that it discusses custom and practice. For what it's worth I offer it to your Honor. At the moment that's the only thing I have. I had brought it in connection with an entirely different issue.

THE COURT: Just a moment while I look at it.

MR. MOLANPHY: Yes, your Honor.

(Pause.)

THE COURT: This seems to support the plaintiff's position, doesn't it? It says here, "Besides, expert testimony may not even have been required since the

behavior issue, use of the metal band to drag a carton, was susceptible to lay jurors' common sense examination as to its propriety."

MR. MOLANPHY: I know. I just said to Mr. Testa I don't know which side that argument favors, but I knew that it discussed it so I handed it in.

MR. TESTA: If your Honor please, I would like to make a motion at this point that in addition to joining in with the shipowner's motion to dismiss the complaint here, I would move to dismiss the complaint and for a directed verdict in favor of the shipowner on the grounds that there is no proof in this case that a space between two steel beams, which is the only testimony in this case, constitutes an unsafe, dangerous condition or an unsafe place to work.

THE COURT: That's exactly what the jury has to decide.

MR. TESTA: There is a case in this department, your Honor, the Nuzzo case, in which the Second Circuit has decided that a mere space --

MR. MOLANPHY: It's mentioned there.

MR. TESTA: It's Nuzzo against the A.S. Rederi. The Second Circuit has already held that a mere space between cargo does not make a vessel unseaworthy. So I

say on the proof produced by the plaintiff here there is a failure of proof because the only proof in this case is as to the existence of a space. There is no testimony that this was dangerous, that it was unusual, that it was improper, that it was an unsafe place to work.

MR. SERGI: He is talking about negligence. When you talk about safe places --

MR. TESTA: No, I am talking about unseaworthiness.

MR. SERGI: When we talk about safe place to work we talk about negligence. The determination as to whether a place is reasonably safe to work is not a question of law, it's a question of fact and a question of fact has to be decided by that jury and if in their minds under all of the circumstances that were described as to the place of work, if this jury decides that that was not reasonably safe, then the vessel is rendered unseaworthy. Now, I don't know any case that says that as a matter of law a space is a reasonably safe place to work.

MR. TESTA: That case says that.

MR. SERGI: Let me see the memo you are talking about.

MR. TESTA: It's cited in the case the Judge

handled.

THE COURT: Just a minute. The motion is denied on that ground.

MR. HOCKETT: Again the third-party defendant ITO joins the motions of co-counsel.

MR. TESTA: I would like to make one other motion, your Honor, and that is as far as the issue of contributory negligence is concerned, there is absolutely no proof in this case up to this point of any contributory negligence by the plaintiff whatsoever. The plaintiff has testified that he never saw this space at any time before this accident happened or after it happened and his own hatch foreman testified that he did not see it before it happened. So there cannot be any issue of contributory negligence in this case, your Honor.

MR. SERGI: Not so, your Honor. I don't understand. Your Honor has made a ruling. You have denied all motions. Now we are arguing the same motions again. I don't understand why motions have to be argued after a ruling has been made.

THE COURT: What's your motion?

MR. TESTA: I am just saying there is no proof in the case of contributory negligence, however, I am opposing

the motion being made here for a directed verdict by the shipowner.

THE COURT: I see. I have already ruled.

Now, Mr. Molanphy, what is the offer of proof that you have with respect to your expert, Mr. Wheeler?

MR. MOLANPHY: My thought was to offer his testimony on custom and practice as to the manner in which steel beams are customarily loaded here in the Port of New York. That would be its pertinence on the plaintiff's case as being some evidence of what should be done.

MR. SERGI: That is to negligence, your Honor, and not as to unseaworthiness. We have argued that point. I think your Honor ruled yesterday that as between the plaintiff and the shipowner here it's of no consequence whether they did this properly or not. What is important is that the jury decides whether there was a space and then decides whether there was a reasonably safe place to work or not and that's all that's important here between the plaintiff and the defendant. There are cases that hold, one specifically is the Usner case which we are all familiar with, it doesn't matter how it's created, who creates it.

THE COURT: You are making this argument now on

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the record for the third or fourth time.

MR. SERGI: Yes.

THE COURT: I was trying to read this opinion again to point out to you what appears to be the holding of the Second Circuit on that. So please don't repeat an argument that you have already made three times.

MR. HOCKETT: Just for the record --

THE COURT: Just a minute, I have to read this again.

MR. HOCKETT: I'm sorry.

MR. MOLANPHY: Before your Honor rules, I am going to withdraw the offer.

THECOURT: You are going to withdraw the offer of your expert's testimony?

MR. MOLANPHY : On the plaintiff's case, yes, your Honor.

MR. HOCKETT: If the Court please, could we have the name of this case cited on the record?

MR. TESTA: It's in that connection, the Nuzzo case. I cited the case without the citation, but it's in the Avena case, which was my case as your Honor can see, and I would like to cite it in support of my motion, if I may.

THE COURT: Just let me put this case on the

record. It's Daniel Avena against Clause and Company decided by the Second Circuit October 1, 1974, which is a few days ago. The docket numbers are 73-2787, 74-1016. Now, this was a case where the district court has dismissed a complaint on the ground that the longshoremen there had failed to produce sufficient evidence of his claim that a condition, that is a band on a large 300 pound carton was unseaworthy and the district court was reversed by the Second Circuit in that case on the ground that there was sufficient evidence based on the plaintiff's testimony that it was customary to use the hooks in this manner in moving these cartons about. The Second Circuit's opinion indicates that perhaps expert testimony of what is customary has probative value in this kind of case, but on the other hand as they point out behavior here was such that it was susceptible to lay jurors' common sense evaluation as to its propriety. So it seems to me that what we have in this case was some testimony offered by the plaintiff as to what was customary on the part of the stevedores in loading these steel beams.

Now, that opened the door to an offer by the vessel to prove by its expert what was customary with respect to the loading of these steel beams. But as I understand it the offer has been withdrawn now.

MR. MOLANPHY: That is correct, your Honor.

THE COURT: All right. Now what do you want to say? You want to cite a case?

MR. TESTA: I want to get a citation from the Muzzo case, which is in here.

MR. HOCKETT: As the attorney for the stevedore in the case at bar I want to take exception to your Honor's interpretation of the so-called expert testimony tendered by the plaintiff as to the way and method that the steel beams were loaded aboard the ship. At the time I took strong exception to the testimony offered by the plaintiff through the Court Carpentry foreman who has no experience and is in no way qualified as an expert. This is in addition to Mr. Testa's motion to dismiss on inadequacy of proof in the plaintiff's case and there has in fact been absolutely no proof whatever regarding stevedoring custom and useage either by the plaintiff or anyone else from which a juror can make any inference at all about the seaworthiness of the vessel or of the negligence on the part of the third-party defendant ITO with respect to the action offer.

THE COURT: Did you want to cite your case?

MR. TESTA: Yes. In support of my motion to dismiss the complaint and for a directed verdict in favor

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of the shipowner on the grounds that mere proof of a space in cargo does not make a vessel unseaworthy, the case is Muzzo against Rederi, A/S Wallenco, 304 Fed. Sec. 506, Second Circuit 1962, where this circuit made such a finding, that as a matter of law, where the only proof is the existence of a space, that does not make a vessel unseaworthy, your Honor.

MR. MOLANPHY: I join in that motion.

MR. HOCKETT: So does ITO.

MR. SERGI: It seems highly irregular and highly unfair for all the counsel representing defendants and third-party defendants to come in here without a memo and without making plaintiff's counsel aware of any of the cases they are going to refer to to argue motions. The rules of this Court require trial memorandums and I haven't received any so I can't argue against the case that was cited.

However, I understand the Court has already ruled that all motions are denied.

THE COURT: All right, let's proceed.

(Jury present.)

THE COURT: All right, the plaintiff having rested, is the vessel ready to proceed with its case?

MR. MOLANPHY: Yes, your Honor.

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THE COURT: All right.

MR. MOLANPHY: Your Honor, the vessel's case will consist of the reading of certain interrogatories that were propounded during the pre-trial stages of this litigation and answers thereto. I would respectfully request that your Honor explain to the jury the nature and purpose of interrogatories.

THE COURT: Yes. In cases of this kind in this Court it's customary for the parties to engage in what we call pre-trial discovery and that includes submitting to the opposite party written questions which the opposite party must answer within a specified time.

It also includes taking the testimony of another party or a prospective witness, which testimony may be read on the trial if the witness is unavailable or may be used by a party for any purpose.

So what Mr. Molanphy is about to do is to read to you questions which he submitted to the plaintiff was it?

MR. MOLANPHY: No, it was to third-party defendant International Terminal Operating Company.

THE COURT: All right, questions submitted to the stevedore which the stevedore answered.

All right, you may proceed.

MR. MOLANPHY: Interrogatory No. 4:

State whether third-party defendant, International Terminal Operating Co., Inc., performed stevedoring operations in the number 4 hatch of the M.S. Trautenfels on, A; June 17, 1968.

Answer: Yes, on June 18, 1968.

I'm sorry, the question was June 17, 1968 or June 18, 1968 and the answer was yes, B; On June 18, 1968.

No. 5: If your answer to interrogatory 4-A or 4-B is in the affirmative, then state, A; The hours between which such operations were performed on each date. 5-A: 8:00 a.m. to 11:00 a.m.

B: The deck level and all levels on which such operations were performed.

Answer: Number 4 hatch shelter deck.

Question 5-C: The nature of such operations, whether loading or unloading.

Answer: C, unloading.

Question 5-D: The kind of cargo handled.

Answer: Steel I-beams.

Question No. 6: State whether third-party defendant International Operating Co., Inc., loaded steel beams in the upper 'tween deck of hatch number 4 of

the M.S. Trautenfels on either June 17th or June 18th, 1968?

Answer: Yes.

Question No. 7: If your answer to the foregoing interrogatory is in the affirmative, state,

A; The date on which said beams were loaded.

Answer: June 18, 1968.

B: The hours between which said beams were loaded.

8:00 a.m. to 11:00 a.m.

C: A general description of the beams giving approximate height, length and width.

Answer: 14 feet by 24 feet by 60 feet.

I don't know whether that is supposed to be inches or feet.

MR. HOCKETT: I will say that it's inches.

MR. MOLANPHY: 14 inches by 24 inches by 60 feet.

MR. HOCKETT: Yes.

MR. MOLANPHY: Question 7-D: The number of beams loaded.

Answer: Unknown.

E: The portion of the deck in which the beams were loaded, portside, starboard side and/or center.

Answer: Stored fore and aft with exception of space in center of hatch for access to ladder.

F: The name and address of the hatch boss in the longshore gang which loaded the said beams.

Answer: Robert Pinto.

Next, your Honor, I would like to read from Defendant's Exhibit A which is in evidence, the plaintiff's deposition, just a portion thereof.

MR. SERGI: Only a portion was admitted, your Honor, certain pages.

THE COURT: All right.

MR. MOLANPHY: This will be from Defendant's Exhibit A, the deposition of plaintiff which was taken on September 10, 1969 and signed, executed by Mr. King on November 3, 1969. On page 22:

The questions were propounded by me and the answers given by Mr. King:

"Q So there was cargo in number 4 shelter deck when you got into it?

"A Yes.

"Q What kind of cargo was in there, Mr. King?

"A It was booms to lift, you know, like you lift up -- hand carry stuff up to these tall buildings, like the boom on it, raise the stuff up. Well, that's what was stored

on top of the beams.

"Q When you say beams, what kind of beams do you mean?

"A It's steel.

"Q Well, were they part of the ship or were they --

"A No.

"Q (Continuing.) -- cargo?

"A No. It's cargo. That's what I was going to lash.

"Q Were these I-beams?

"A What I was going to lash was this stuff I am telling you that is stored on top of the steel beams. You know, they is flat on top and they did drop that stuff down on there which we had to -- we was going to pull it to the wing to lash it.

"Q So on the bottom of the shelter deck there were these steel beams, is that right?

"A No. The big steel beams, right.

"Q Yes.

"A Yes.

"Q And this was cargo?

"A Right.

"Q And was that all over the deck of the shelter deck, the beams?

"A Right.

"Q And on top of the beams there were these booms?

"A Right.

"Q That they used in construction work?

"A Right.

"Q Was there any other kind of cargo in the shelter deck?

"A No, there wasn't.

"Q Now, the beams, are they what they call I-beams?

"MR. COHEN: If you know.

"Q If you know.

"A Well, I will explain it as well as I can.

"Q Okay.

"A It's like they use for building heavy bridges, like that, maybe heavy buildings, something like that.

"Q And were they stowed fore and after in the ship?

"A Right.

"Q About how long were these beams, Mr. King?

"A Well, I guess them beams were about 70 feet long, as near as -- I didn't measure them. Somebody measured

them, but I didn't, afterwards.

"Q And they went from one side of the ship all the way over to the other side of this shelter deck?

"A Yes.

"Q And were they stowed side by side?

"A Yes, they were.

"Q Were these beams at the time you went into the shelter deck, were the beams completely covered by these structural booms or these booms that are used in construction work?

"A Well, there was a space about like this for me to walk down between (indicating).

"MR. MOLANPHY: Indicating about --

"MR. COHEN: Show us again how big a space was there.

"THE WITNESS: About like that. (Indicating.)

"Q Three feet wide?

"A Yes.

"MR. COHEN: Yes.

"A (Continuing) Something like this, as near as I can guess. (Indicating.)

"MR. COHEN: Yes.

"Q Now, in that passage 30 feet wide, there were no cargo stowed except the booms on the deck?

"A Except the steel on top of the beams, not that I know.

"MR. COHEN: You don't understand what I am saying."

There was a discussion off the record.

And the witness answered:

"A No.

"Q And did this passageway go all the way from the front of the shelter deck to the after end of the shelter deck?

"A Right.

"Q And was it your intention, Mr. King, to go all the way to the after end of the shelter deck?

"A Right.

"Q Where was your partner at this time?

"A He was behind me.

"Q As you started to walk towards the after end, Mr. King, were you carrying anything?

"A Yes, I was.

"Q What were you carrying, sir?

"A I had a coil of wire on my shoulder. (Indicating.)

"Q Indicating the right shoulder?

"A Yes, and I was holding it -- and I was holding it

was this hand. (Indicating.)

"Q Indicating the right hand?

"A I had two boxes of clips in my left hand.

"Q As you walked towards the after end was there any cargo up on your left-hand side and also cargo up on your right-hand side?

"A Right.

"Q Was that cargo over your head or was it lower than that?

"A Well, in some places it was high -- it was as high as my head or maybe higher.

"Q Did you have any difficulty seeing down the hatch?

"A Well, it wasn't too bad because the top -- it wasn't covered over, you could see pretty well.

"Q The hatch above you was completely open, is that right?

"A Yes.

"Q And it was daylight?

"A Yes, it was daylight.

"Q What was the flooring that you were walking on as you walked toward the after end of the shelter deck?

"A The steel beams.

"Q Were they flat on top?

"A Yes, they was flat on top.

"Q About how wide was the flat surface of each beam?

"A Well, I will say about 12, 14, 16 inches, I guess.

"Q So there was a floor of about 2 or 3 beams in this space that you were walking on as you walked toward the after end?

"A Yes, something like that.

"Q Was the flat part of each beam stowed right up against the flat part of the beam next to it?

"A No, it wasn't.

"Q Was there a space in between the beams?

"A Yes, there was.

"Q How wide a space was there, Mr. King?

"A Well, a space -- after I fell in --

" MR. COHEN: He didn't ask you that, Mr. King.

"A How wide was the space?

"MR. COHEN: When you got off the ladder.

"A Well, the space wasn't the same width all the way.

"Q As you got off the ladder at the front end of the hatch --

"A Yes.

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"Q (Continuing.) --the forward end, was there any space between the beams that you were going to walk on?

"A Well, I didn't pay any attention. I was just walking on top of the beams.

"Q You didn't notice whether there was a space there or not?

"A No, till after I fell in it I didn't.

"Q Did there come a time as you walked toward the after end when you became aware that there was a space between the beams?

"A No, I didn't notice -- see whether there was a space between the beams.

"Q How far toward the after end did you get before something happened?

"A I guess I walked about 20 feet or 25 or 30 feet from the ladder.

"Q Would that be about halfway to the after end of the hatch?

"A Well, practically. Maybe. Not -- it wouldn't be half.

"Q What happened?

"A The only thing I fell in. My foot was in there so I called the guy to help me get out.

"Q Which foot do you mean, Mr. King?

"A The left one.

"Q When you say it fell in, where did it go in?

"A It went in down to my knee. It didn't go no further.

"Q Well, did it go into a space between beams?

"A Right.

"Q How wide a space was that, Mr. King?

"A Well, I will let you judge. It was wide enough for me to catch here. (Indicating.)

"Q Indicating just below the knee?

"A Right. That's what stopped it.

"Q So what would it be, something like four or five inches?

"A Something like that.

"Q And is that how far you went into the hole or the space up to, just below your knee?

"A Right.

"Q Mr. King, was there just one layer of these beams on deck or were there layers below that, too?

"A No. There wasn't any below that.

"Q Just one layer of steel beams?

"A Right.

"Q Did your foot go down as far as the deck?

"A No. My foot couldn't touch anything.

"Q Do you know approximately how deep these beams were at that point?

"A Well, there was about 24 inches high.

"Q And up until the time your foot went in you hadn't noticed this space between the beams?

"A No, I hadn't.

"Q Did you notice this space between the beams after your leg went into it?

"A Yes. I was in it.

"Q And could you tell at that time whether this space between the beams ran the whole length of the b eams?

"A Well, I didn't notice that close, but I know it was -- I noticed it getting narrower and wider, see, from where I stepped in.

"Q Well, from the point where you stepped into this space was it wider as you looked forward, as you looked further toward the after end of the hatch?

"A Narrower.

"Q Narrower. So that it would have been wider back in the forward end of the hatch?

"A I think so. I hadn't noticed it.

"Q (Continuing.) -- where you left from?

"MR. COHEN: Did you understand what he said

or don't you listen to him?

"THE WITNESS: Yes.

"MR. COHEN: What is the question?

"THE WITNESS He asked was it wider where I was going.

"Q Was the space getting wider?

"A Yes.

"Q As you looked ahead?

"A Yes. It was wider the way I was going.

"Q Mr. King, did you see spaces between any of the other beams?

"A No, I didn't.

"Q They were all up against one another?

"A Yes. I looked but I didn't see any.

"Q And this was the only one where you saw a space between the beams?

"A The only one."

"MR. MOLANPHY: That concludes the shipowner's case, your Honor.

THE COURT: All right, at this time we will excuse the jury for lunch. We are going to recess now until 2:00 for lunch. The jury is excused.

MR. SERGI: Your Honor, may I open plaintiff's case for just one moment? All counsel agreed prior to the

commencement of this action that the medical expenses incurred and paid for in the case of Mr. King was $1,550; is that what the amount is, Mr. Testa?

MR. TESTA: Yes.

MR. SERGI: Thank you very much.

(Jury not present.)

MR. SERGI: May I make a motion on behalf of the plaintiff at this time, your Honor?

THE COURT: I have now read the Nuzzo case which you referred to, Mr. Testa, in making your motion at the end of plaintiff's case. As that pinpoints out, there must be a finding that the stowage was not within the customary and usual standard of the calling; that is if there is a space or hole in a stowage of lumber on the floor or deck of a ship, as you indicated, that is not sufficient. There must also be testimony that it was not -- or some evidence from which the jury could find that this was not within the usual and customary standard of the calling.

Now, as I pointed out before, we did have the testimony here of Mr. Auletti, the foreman, who claimed that he had been working as a carpentry boss, or in one position or another on board a ship for I believe it was 28 years and that it was customary at one point I believe

he said for the stevedores to chock such beams; that is to lay a wooden floor first and then put the beams on top and then put chocks in between the spaces. At another point he said that this was done after the cargo on top of those beams had been stowed and that it was not unusual to have these spaces in the stowage at that point.

Now, the shipowner wanted to call Mr. Wheeler, whose testimony I assume would have been that the beams here were stowed in the customary manner, is that right, Mr. Molanphy?

MR. MOLANPHY: Well, your Honor --

THE COURT: Would that have been the substance of his testimony?

MR. MOLANPHY: I was not prepared to accept plaintiff's description of the manner in which the cargo was stowed.

THE COURT: I am asking you of what the substance of your expert's testimony would have been.

MR. MOLANPHY: That it would not have been unreasonable to encounter spaces in stowage of this kind, not unexpected.

THE COURT: And as I have indicated, this other case which we -- the more recent case which we referred to

earlier, the Avena case, seems to indicate that that testimony or that kind of proof is probative, although not I guess conclusive. It says, "To be sure, evidence of custom need not be conclusive on the proper or intended use but it certainly has some probative value and in fact would come to constitute the usual form of proof on this issue."

Citing this Nuzzo case which I just read, so it seems to me that the testimony of the expert witness, Wheeler, if he was that, on the customary method of stowing these beams on board a ship would have been properly admissible.

Now, in view of that ruling or revised ruling of the Court having read this case just cited by Mr. Testa, are you still offering to withdraw your offer of proof?

MR. SERGI: Counsel has already withdrawn that offer, your Honor.

THE COURT: I have revised the Court's ruling. I have said that we now have a case which seems to indicate that that offer of proof would have been proper and I am now asking him if he now wants to, in light of that opinion, offer that testimony.

MR. SERGI: Your Honor, May I be heard, please?

THE COURT: No, because I am speaking to Mr. Molanphy.

MR. MOLANPHY: Your Honor, I think what I will do -- what I will do is to stand by the withdrawal and join Mr. Testa in his motion directed towards the sufficiency of plaintiff's proof.

THE COURT: All right, taking Mr. Testa's motion first, that is that the proof on the plaintiff's case was insufficient to afford the basis for a finding by the jury that the stowage was not in accordance with the usual and customary standard of the calling. I will hear you on that, Mr. Sergi.

MR. SERGI: Your Honor, I have argued before and I will argue again that the determination as to that it is or is not a reasonably safe place to work is a question of fact . That fact is to be determined by this jury.

Now, whether an area is of customary use or not and whether spaces are there customarily or not is of no consequence. The real issue is first whether there was a condition, such as a space into which Mr. King stepped, and the second determination by this jury, as a question of fact, is to whether the space being in the area where he had to work under the

circumstances of which he had to work was a reasonably safe place to work. If that be so, then why take away from the jury to make a finding of law if it's a question of fact. It just doesn't follow. In the case that they are arguing I am at a disadvantage. I don't have a memorandum and I don't know the cases that they are arguing.

THE COURT: The answer to the question I have already set forth in discussing this very recent case which they handed up which I guess you haven't had a chance to read because it came down October 1st and they just handed it up.

MR. SERGI: No, your Honor.

THE COURT: The answer to the question to you is that there was testimony from Mr. Auletti who had 28 years experience regarding the usual and customary method of stowing these beams, wasn't there?

MR. SERGI: Yes. I don't see that that's of any consequence at all.

THE COURT: Well, the question is whether there is sufficient evidence on your case. The evidence we have as to that is the testimony of this carpentry foreman who testified that he had 28 years experience and that this was the usual and customary way that they

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usually put down a floor, but then he also said that it wasn't unusual to have spaces. Now, that is to say that there is some evidence I guess from which the jury could find that it was customary.

MR. SERGI: The sufficiency of the plaintiff's proof, your Honor, is only as to whether there was sufficient proof here to establish to this jury that there was a space. The sufficiency of proof is directed as to whether Mr. King stepped into that space and the sufficiency of the proof is whether there is sufficient facts here for this jury to determine whether the area was not reasonably safe.

Now, that's where the sufficiency of my proof lies. I don't have to prove whether it was a proper and customary method of loading. That's of no consequence. That goes as to negligence. It's not in this case at all.

THE COURT: That's directly contrary to the Nuzzo case. I just told you that.

MR. SERGI: I don't know what the Nuzzo case holds.

THE COURT: Suppose you read it. We have taken a recess until 2:00. Your problem is as I said before, that you don't have any cases to support your position. The defendants pulled these out, as you see, at the last minute without giving you an opportunity to read them and

be prepared to answer them.

MR. SERGI: Would your Honor give me an opportunity to submit cases in contradiction to the cases being submitted by counsel because I think that's the way it's done.

THE COURT: The only thing we could do now is to have you read these two cases. I just read them. The question is whether there is on the plaintiff's case sufficient evidence regarding the customary and usual method of stowing steel beams.

Now, as I have indicated, the problem with the testimony of Mr. Auletti, and maybe I am incorrect. Maybe I am not remembering it correctly. He seemed to say initially that the stevedores went on board the ship, loaded these steel beams by putting first a -- what did he call it?

MR. TESTA: Dunnage floor.

THE COURT: Dunnage floor and putting these steel girders on the floor. He referred to the top of the jury rail. He is talking about 6X2's or something of that nature. He said they used wood of that kind. And that they tended to use pieces of that wood to plug up holes, in effect.

At another point, if I remember his testimony

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correctly, he said it wasn't unusual to have these spaces and that what happened was they went down and tied up the cargo first and then filled up the spaces.

Now, am I remembering his testimony correctly, Mr. Sergi?

MR. TESTA: That is correct.

MR. HOCKETT: That is correct.

MR. TESTA: That is exactly what he said.

MR. SERGI: Your Honor, may I respectfully direct the Court's opinion to my request to charge wherein I cite the United States --

THE COURT: No, I asked you a question. The other two lawyers answered it, although I wasn't addressing them. I am asking you if my recollection of Mr. Auletti's testimony is correct.

Now you can answer that yes or no and if it's no then tell me wherein that is incorrect.

MR. SERGI: What is your recollection, your Honor?

THE COURT: Do you want to read it back, Mr. Reporter, because I have said it twice now.

MR. SERGI: I am concentrating on something else. I am sorry I didn't listen to your Honor's presentation.

(Record read.)

MR. SERGI: Yes, your Honor, in substance. But the point I am making, your Honor --

THE COURT: The point I am making is maybe you better read the Nuzzo case on which your opponents rely in making their motion and this Avena case, a more recent decision, citing that as a proper method of proof in this kind of case and then we will take it up -- coming back at 1:40. The jury is coming back at 2:00 and then we will continue this after you have had a chance to read it.

MR. SERGI: During the recess, your Honor, may I respectfully ask is the Court --

THE COURT: May I ask the cases to you?

MR. SERGI: Thank you. I will read it, but during the recess may I respectfully ask the Court to make reference to the United States Supreme Court decision -- not the district court decision, but the United States Supreme Court --

THE COURT: We are talking about Second Circuit opinions. We haven't cited any district court opinions. These are both Second Circuit opinions.

MR. SERGI: I am referring to United States Supreme Court decisions which I think is paramount and that is in the case of Usner against Luckenback Overseas

Corporation, 400 United States 562 wherein they state it does not matter how, by whom, where, what custom, anything at all, how that condition came about. Once the condition is established as being there, the vessel is rendered unseaworthy if the condition renders the area unreasonably unsafe.

Now, that is what the case of the United States Supreme Court says and in spite of what that decision you just handed me states, I think the United States Supreme Court is still paramount in its decisions and in its opoinions.

MR. TESTA: If your Honor please, may I be heard at this point? I think that Mr. Sergi has just hit the point right on the head. The point is that there is no proof in this case that this space made this vessel an unsafe place to work; that it was dangerous, defective or anything to that effect. The proof is to the contrary. The proof from his own witness is that it was usual and customary and that's the way it was done. He has the burden of proof here of establishing that this vessel was unseaworthy and he has failed completely to sustain that burden of proof because not only has he offered no proof to show that this was an unsafe place to work or a danger and improper condition, but he has offered proof to the

contrary by his own witness who said this is usual and proper and customary. That's the point of my motion, that there is a failure of proof here based upon Nuzzo and the Nuzzo case incidentally is cited in the shipowner's --

THE COURT: Yes, we went over that. You are only repeating the Nuzzo case. That's what the Nuzzo case says.

MR. TESTA: It's in the memorandum.

Mr. Sergi says he is not aware of it. It's in the shipowner's trial memorandum, your Honor.

MR.SERGI: I don't have any trial memorandum from anybody.

MR. MOLANPHY: For the record, I would like to note that Nuzzo was cited in my request number 4 tocharge at the original trial. A copy of those requests were served on Mr. Sergi, so the indication that t his is an afterthought is not quite accurate.

MR. SERGI: There is no question that whether an area is reasonably safe or not reasonably safe is a question of fact and the question of fact is one to be resolved by a jury. There is no question about that.

Now, they are introducing other factors here to c[illegible] the entire --

THE COURT: What the jury has to find is that

this was an unseaworthy condition.

MR. SERGI: Yes, whether the place was not reasonably fit for working.

THE COURT: Now, then, what evidence is there from which the jury could find that this was an unseaworthy condition? What is the evidence from which they can find?

MR. SERGI: The evidence, your Honor, is that the conditions under which Mr. King had to work, if there was a space there and he stepped in the space. Now, they first decide whether there was a space and secondly they decide whether he stepped int it and now they have to decide whether having a flooring of beams with a space into which a workman steps is a reasonably unsafe place. There are multitudes of cases which I cite in my request to charge and again I refer to Olivarius, it's in my requests, and Usner. If you find there was a space into which the plaintiff stepped into, this renders the vessel unseaworthy. Nothing more need be shown except that there was a space as described. That's Olivarius, and in Olivarius there was a defective door latch and because his finger was in there and the defective door latch and that was the only testimony and they said that's all you needed.

So here you have a space. If they believe the space was there, that's all we need. What more proof do I have to offer?

MR. TESTA: The proof that has to be offered, your Honor, is some proof that that space constituted a dangerous, unsafe or proper condition.

MR. SERGI: He is talking about negligence.

THE COURT: A broken latch is obviously a defective condition with respect to a door which because of a latch is broken would slide and hurt someone, but the issue here is whether this was an obviously unsafe condition or whether this was the usual and normal method of stowage. That's the question. That's what the jury has to find. They have to find whether this was the usual and normal method of stowage so departed from the usual and normal method of stowage so as to constitute a dangerous condition.

That's the issue. Now, the next question is is there sufficient evidence from which the jury could so find. Now, with that we are going to recess until 1:45.

(Luncheon recess taken.)

* * *

AFTERNOON SESSION

1:50 p.m.

(Jury not present.)

THE COURT: All right, Mr. Sergi, have you had an opportunity to read that Nuzzo case?

MR. SERGI: I will first direct my attention, my argument, rather, to the case, the most recent decision of June 1974, Avena against Clause and Company.

That case, your Honor, is quite different than the case at bar at this moment. That case related to whether the bands around the bandswhich were broken --

THE COURT: Bands around the carton. You said bands around the bands.

MR. SERGI: Yes. Whether the bands were intended to be used for pulling. That was what that case was all about. Here we have a flooring and obviously the flooring was to be used or was used for walking upon so this case has no relation -- the case of Avena has no relation to the case at bar.

THE COURT: Let me see if I understand that. You are saying that what we had here was a floor on which the plaintiff had to walk?

MR. SERGI: That's right, your Honor, so therefore the floor was intended for walking upon. There

was no other way for men to get there. They can't come down suspended from a hook. You have got to walk on that cargo in order to get to what you are going to do. There was no other way.

THE COURT: So you are saying we have a case relating to providing a safe work area, that is a floor on which to walk as opposed to a stowage case requiring expert knowledge as to the usual and customary manage of stowage? What is your argument, is that it?

MR. SERGI: My argument is that Avena doesn't apply to the case that we are trying here in that Avena was a holding as to whether -- solely a holding as to whether the band around the box was intended to be used for dragging. That's what the Avena case was all about. In the dissent it indicates that at least hatch covers were intended to walk over as a flooring because people work and they must walk back and forth. Here this c lient, the plaintiff here is walking on an area where he must walk. He has no choice to walk anywhere else. The Avena case is not in point at all.

THE COURT: I am asking you about the instant case. Did you get to the Nuzzo case?

MR. SERGI: Yes.

THE COURT: The discussion there was about

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stowage, proper stowage and whether there was evidence that this was the usual and customary manner of stowage. Do we have the same thing here, that is a floor made of stowage?

MR. SERGI: We have a similar situation, but I think we are all guilty of taking dicta and principles out of context. If I may indicate what I mean:

The Nuzzo case was quite different than the case we have here in point. In the Nuzzo case a longshoreman was involved and he was not walking on the flooring of steel beams that were placed there flatly. He was working upon and discharging lumber. The place in which he stepped was not in the area in which he was working or walking. The place in which he stepped was a space between the wall of the ship, the skin of the ship and the end of the cargo, way over in the end. There is no claim here that he stepped into a space in the cargo itself. He stepped into a space up against the side of the ship and away from the place where he was walking. That is the factual difference in that case and this case. In this case Mr. King is walking in an area provided to him by the shipowner. The shipowner is stating to him, "This is where you must walk because there is no other place for you to walk in order to get down

there and do your chocking and your lashing," and that's where he was walking, where it was intended to him to walk, and in making that representation that the flooring is where he was to walk, the shipowner makes a warranty, a representation that that place where you are going to walk and work is reasonably safe.

Now the argument is whether an open space in the flooring where he is going to walk to do his work is unreasonable under the conditions under which he was working. That I suggest to your Honor and I urge upon your Honor is a question of fact for this jury. They will decide whether a space in the flooring where Mr. King had to walk in order to do his work was reasonably safe under the circumstances.

There are many cases which say even if the unseaworthy condition is a considerable one and not predicated on defect in the hull, gear or stowage, the failure of the shipowner to perform the condition regardless of notice prompts the warranty and that is the case of Amador against A/S.J. Ludwig Mowinckels Rederi 224 Fed. 2d.. 437, among others.

Now, I don't know how much more proof I have to offer. Your Honor didn't think so before. Your Honor didn't think so in the first trial. The same

arguments were made. The Nuzzo case was referred to and your Honor made the decision there, that it's a factual determination by the jury to make.

THE COURT: The Nuzzo case was referred to, you say?

MR. SERGI: Yes, your Honor. On page 160 of the transcript the argument was made by Mr. Molanphy and he referred to the Nuzzo case and your Honor decided that the case should go to the jury. That's on page 159.

THE COURT: The problem there was we were submitting it also on the issue of negligence.

MR. SERGI: But this argument was on unseaworthiness.

THE COURT: That's why it didn't make any difference there, the jury might have rested its decision as it did wholly on negligence, but it found that it was improperly submitted on the issue of negligence and if it went to the jury, or if the jury had the case improperly submitted to it on the issue of unseaworthiness it would not have mattered because it was properly predicated on negligence.

MR. SERGI: The argument was made --

THE COURT: Now we have only the unseaworthiness issue going to the jury so we can't rely on the fact that they might have another cause of action properly submitted

to it.

You will have only one and the question is now is whether this is properly submitted to the jury.

Now, if I understand your argument, and please try to listen. If I understand your argument it's that in this case we have a carpenter who goes on board a ship to lash cargo and it's undisputed in this case that he had to walk on the cargo to do that job, so the issue is whether the area in which he was sent to work or had to work was reasonably fit because he had to walk on these steel beams.

MR. SERGI: That's the issue.

Now, if I understand the arguments of the counsel for third-party defendant and other counsel, they are suggesting that I had to offer proof to show that that was a negligent act in the loading of that stow before I can prove that the condition is unseaworthy; that the stow was improper? I think that's their argument. I have just cited a case to your Honor where it says it's of no consequence whether the stowage was predicated upon perfection or not. If I have to refer to Mr. Auletti's testimony, after all didn't he say that these things could be placed closer together if they did their work properly? Some gangs do and somegangs don't.

THE COURT: Let's not let two things run together. That's what I am trying to separate. To attack the stow as improper is one thing. What was happening here was they were in the process of stowing, which according to one part of Mr. Auletti's testimony had not been complete, so --

MR. SERGI: Not so, your Honor. The testimony is that the beams had completely been stowed and they had placed upon there these large cranes and that's all the testimony is here and that the work was finished. There is further testimony here that carpenters cannot work until the loading is all finished and that's why there were no longshoremen aboard and no longshoremen in the hatch. So obviously, they had finished. Pinto said they had gone; that they had finished this hatch.

THE COURT: Can I finish my sentence now?

MR. SERGI: Yes.

THE COURT: Would you read back what I was saying before I was interrupted by Mr. Sergi.

I lost my train of thought.

(Record read.)

THE COURT: (Continuing.) Se we are not dealing with a case in which there could arise the question of improper stowage because they were in the process of stowing.

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They were in the process of securing this cargo. If I understand stowing, that's what it means, putting in the cargo and stowing it, securing it. They were in the process of it. So we don't have a question of whether it was properly stowed, we have a question of whether the plaintiff was provided with a safe place to work because he was required to walk on these steel beams as opposed to whether the cargo was properly stowed. The issue must be whether the ship was unseaworthy not because the stowage was improper, but because the plaintiff was not provided with a safe place to work, he was provided with a floor which was unsafe for the work for which he was required to do. Is that what you are trying to say?

MR. SERGI: I would like to submit to your Honor that there must be a separation here of stowing and securing. That's why we have two separate third-party defendants here. The stowing is performed by the stevedore. The lashers or the carpentry company have nothing to do with the stowing. So the stowing of the cargo had been completed by the time the lashers came into the hatch.

THE COURT: All right, so therefore the issue is whether the stowage was proper. You say the stevedore had completed the stowing of these beams. The only issue,

therefore, in the case, was whether the stowage was proper or whether it was so improper as to create an unseaworthy condition and the issue now is whether you have offered proof on your case from which the jury could find by a fair preponderance of the credible evidence that the stowage was so improper as to result in an unseaworthy condition. Now, that's where we are.

I will hear you on that issue, as to whether you produced enough evidence from which the jury could so find.

MR. SERGI: I respectfully take exception that that's what my proof has to be, but nevertheless I now refer to the testimony of Mr. Auletti, who testified --

THE COURT: In that connection I am going to have the reporter read it because we all have the same problem of remembering exactly what was said and that's why we have reporters.

So do you want to read Mr. Auletti's direct testimony and cross examination?

(Record read.)

THE COURT: Having heard the testimony now, the complete testimony, both direct and cross examination of the witness Auletti, the Court rules that there is evidence from which the jury could find from a

fair preponderance of the credible evidence that the cargo, that is the steel beams here were improperly stowed, so the motion to dismiss the plaintiff's case is deneid.

Now, we had your case, Mr. Molanphy. Do you have anything further on your case?

MR. MOLANPHY: No, your Honor. I intend to rest.

THE COURT: All right. Do you have anything, Mr. Hockett?

MR. HOCKETT: No live witnesses or other types of evidence to be introduced, but I think at this time I would like to make a motion directed to the shipowner's case. As a third-party defendant as the shipowner has in fact rested, at this time I would like to make a motion to dismiss the third-party action against the third party defendant ITO based on the failure -- the complete failure of any proof being adduced to show that the longshoreman did anything that would constitute a breach of the workman-like performance. There is no testimony either from the direct case or any testimony at all in the shipowner's case that would suggest that the job was done in any way negligent. From the complete absence of proof therefore and the question of stevedore's conduct, I respectfully move on the question --

THE COURT: Do you want to reply, Mr. Molanphy, on the motion to dismiss your case?

MR. MOLANPHY: Yes. I believe the Ryan case in the Supreme Court establishes the principle that an independent stevedoring contractor warrants its own performance and that breach of that does not depend upon negligence of any kind; that if the jury in this case should find in favor of the plaintiff it could only be on the findings that cargo actually stowed by ITO was improperly stowed and that would in effect entitle me to judgment as a matter of law against this third-party defendant which by its answers to interrogatories and its own admissions in open Court did the actual stowing of this cargo. The only way that the shipowner could be held would be on the basis of improper stowage and then I would in turn look to the party that stowed that cargo for reimbursement based upon its warranty.

THE COURT: In other words. you are relying on the testimony of the plaintiff's case regarding the improper stowage here, is that it?

MR. MOLANPHY: Exactly.

MR. HOCKETT: If the Court please, as we mentioned before, the burden of proof with respect to an unseaworthy claim against the shipowner is different in

the quantity and quality than it is by a shipowner against a third-party defendant such as a stevedore. It's respectfully submitted that there has been no testimony from anyone to suggest that the stowage was improper.

THE COURT: We have just gone over that with respect to the motion to dismiss the plaintiff's case.

MR. HOCKETT: Excuse me, Judge, but let me just finish. The only testimony that has been given is that there was this space There has been no testimony that this space was in any way a result of something by way of commission or omission on the part of the stevedore. The question as I understand it to be submitted to the jury is with regard to whether or not the space, regardless of whether or not this was in the custom or practice or not, was such a space as to cause an unseaworthy condition. I suggest to your Honor that in order to hold the stevedore in, this shipowner through positive testimony or documentary proof would have to show that what the stevedore did in fact was not in conformity with custom and practice. This I submit to you has not been done and, therefore, as far as the proof is concerned against this third-party defendant, ITO, the shipowner has failed to sustain his burden.

THE COURT: The Court rules that the shipowner

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could rely on the testimony already in the case. We are trying this together. The parties elected to have it tried together as one case to the jury, which means that he doesn't have to put in repetitious testimony and it was your cross examination of the witness Auletti which brought out the fact that this cargo was improperly stowed. He said that these guys today don't want to do it right; that the way to do it is to put it close together.

Now, the reason for your cross examination was exactly that, to determine whether the stowage was proper or not. So your motion is denied.

Is there any other motion directed to the shipowner's case?

MR. TESTA: Yes, your Honor. At this time I would like to move on behalf of my client, Court Carpentry and Marine Contracting Company, to dismiss the third-party complaint and for a directed verdict in favor of Court Carpentry on the ground that there is a complete and total failure of proof that there was any breach of warranty on the part of my client to perform the lashing and carpentry services in a workman-like manner. There is no proof --

THE COURT: All right, I will hear

Mr. Molanphy as to that.

MR. MOLANPHY: Your Honor, my opposition to that motion is two-fold. One, the plaintiff's own contributory negligence, if found, would constitute a breach by his employer of its warranty of workman-like performance under the cases that I have cited in the trial brief, namely, the Mortonson, McLoughlin and Hartnett cases.

THE COURT: I think we went over that and you would not be entitled to recover off Court Carpentry because the jury would already have taken that into consideration and subtracted that from its verdict.

MR. MOLANPHY: Your Honor, I believe that was your Honor's ruling in considering the counter-claim of Court Carpentry as against the employee. That was your Honor's ruling on that aspect of it. But on the shipowner's claim for indemnity against Court Carpentry, the negligence of its own employee, if found by the jury, is imputed to his employer, Court Carpentry, insofar as the action for indemnity is concerned.

THE COURT: That's what I am saying. How are you going to be indemnified if it's already deducted from the plaintiff? It's not paid out by you.

MR. MOLANPHY: I am not looking for any more from the plaintiff, your Honor.

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THE COURT: What are you looking for?

MR.MOLANPHY: I am looking for indemnity for the residual from either or both third-party defendants.

Now, insofar as the third-party defendant Court Carpentry is concerned, I would still in the event of a finding of contributory negligence be liable to plaintiff for some of his recovery initially and it would b e that remainder that I would look to his employer for reimbursement.

THE COURT: How can you look to his employer for that reimbursement?

MR. MOLANPHY: Your Honor, that's what happened in all three of those cases that I cited to your Honor, namely Mortonson, McLoughlin and Hartnett. The plaintiff was contributorily negligent, which meant that the shipowner, based on unseaworthiness, was liable to him in the first instance. His contributory negligence was insofar as the indemnity suit was concerned attributable to his employer and, therefore, the Judge, as a matter of law, directed a verdict in favor of the shipowner against the employer based solely upon the employee's contributory negligence.

MR. TEST: May I be heard further, your Honor?

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MR. MOLANPHY: It appears in two aspects of the case. Initially the plaintiff's contributory negligence --

THE COURT: Let me ask you this, then. You rely solely on the plaintiff's contributory negligence for your claim that Court Carpentry breached its duty of workman-like performance?

MR. MOLANPHY: No, your Honor.

THE COURT: All right, what else do you rely on?

MR. MOLANPHY: I mentioned in the beginning that my reasoning was two-fold.

Secondly I believe there has been sufficient testimony on the part of Mr. Auletti that his activity as a supervisor was less than exemplary. He looked into the hatch. He didn't bother to check around for safety conditions at all, he just sent his men on down and these men, according to Mr. Auletti, worked around down there for an hour before anything happened to Mr. King.

Now, if this condition was a dangerous one, then by Mr. King's own admission he is supposed to report dangerous conditions to his supervisor. Nobody did anything. The one who -- as of that time the only party who knew or could have known of existing conditions

down in the number 4 'tween deck was Court Carpentry and its employees, including the plaintiff, Mr. King. If they did nothing either to report a dangerous condition which they either knew about or should have known about in the exercise of reasonable diligence, that failure to do anything about it would constitute a breach of the employer's warranty of workman-like performance.

So my contentions as against Court Carpentry are two-fold. Number one, based upon the allegations that plaintiff himself was contributorily negligent, which on the indemnity suit would be attributable to his employer and, secondly, that Mr. Auletti failed in his duties as a supervisor of Mr. King and that no one reported this allegedly defective or dangerous condition, even though according to Mr. Auletti's own testimony they were supposed to and they worked down there for a full hour before anything happened.

THE COURT: All right, Mr. Testa.

MR. TESTA: If your Honor please, the warranty made by my client was to perform the lashing and carpentry services in a workman-like manner. That is the one and only warranty we make to the shipowner.

THE COURT: Doesn't that include an implied warranty that it would not send its men into an obviously

unsafe situation?

MR. TESTA: Yes, but Mr. Auletti testified that he would not have sent them into this hold if he hadn't thought it was safe. That was the very last question on Mr. Sergi's redirect examination. He said that if he sent the men down to lash, the hatch was safe. Otherwise he wouldn't have sent them down there. So there is no breach of our warranty where Court Carpentry's foreman says on three or four different occasions that it's usual and customary to see a condition like this, a space in the hatch and that he didn't consider it unsafe or dangerous because otherwise he wouldn't have sent the men down there.

So there is no testimony in this case which would show a breach of warranty of workman-like performance on our part where our own man says that he thought it was safe, otherwise he wouldn't have sent the men down. So I say again there is a complete and total failure of proof that Court Carpentry in any manner, shape or form breached their warranty, which was only to perform the lashing and carpentry services in a workman-like manner.

Now, as far as anything else is concerned, as far as any possible contributory negligence on the part of Mr. King is concerned, this is not something which

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would cast the shipowner into liability. We are only trying seaworthiness in this case and the shipowner can only be held liable in this case if he failed to furnish plaintiff with a seaworthy vessel and the only way it can be held there is is if these beams which were improperly stowed by ITO. There is no doubt that Court Carpentry had nothing to do with the stowage of these beams. Mr. Pinto's testimony was read into evidence. There is no question that the beams were put there by ITO. So the shipowner cannot be held liable because of any negligence or contributory negligence of Mr. King. That is not an issue in this case. Your Honor already ruled out negligence and contributory negligence.

The only way the shipowner can be held liable here is if the jury finds that this vessel was unseaworthy and the only way they can find that vessel was unseaworthy was if they find ITO didn't stow the beams properly. So Mr. King's contributory negligence, if there is any, and I state to your Honor there is absolutely no proof in this case of any contributory negligence by Mr. King, but even if there were it would not cast the shipowner into liability and he would only be entitled to recover indemnity from my client if we did something that cast the shipowner into liability and we

didn't. There is absolutely nothing in this case that Court Carpentry did which would make the shipowner responsible to the plaintiff. We are not responsible for the condition. There is only one thing that plaintiff is complaining about, and that's a space in the stow and we are not responsible for that space in the stow. We didn't create that space and that's the only thing that can cast the shipowner into liability.

THE COURT: Well, he seems to suggest that your foreman had a duty to go down there and inspect before sending his men down to work and if he had done that instead of staying up on top of the deck he would have discovered this condition.

MR. TESTA: He did discover it, your Honor. He inspected from the main deck. This is only a distance of 12 feet. The testimony is that the distance from the main deck or weather deck to the bottom of the upper 'tween deck is 12 feet and Mr. Auletti testified that he looked into that hatch from the main deck; that he saw the space there, but he didn't think it was unsafe or dangerousor he wouldn't have sent the men in there. So there is no breach of any warranty of workman-like performance by our client under any conceivable theory here; under any conceivable legal theory.

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THE COURT: All right, Mr. Molanphy.

MR. MOLANPHY: Mr. Auletti testified that he saw this condition in the hatch after the accident at a time when he was still standing up on the main deck. He never did go down. So if he was able to see it after the accident how can --

THE COURT: He said he didn't think it was dangerous because he said they do this all the time.

MR. MOLANPHY: If the jury decides it's dangerous, then Mr. Auletti should have decided it was dangerous, but moreover I would like to ask Mr. Testa, does he contend that the plaintiff's contributory negligence is not attributable to his client?

MR. TESTA: Inanswer to that, your Honor, I say in the context in which this case is being tried, any contributory negligence, even if it's found on behalf of Mr. King, would not cast the shipowner into liability. So it wouldn't make any difference. He can only be held in this case because of a space in the beams and if they find that's an unseaworthy condition, that space was created by ITO not by my client.

THE COURT: Let me ask you this, Mr. Molanphy. Do you seek to recover from both of these third-party

defendants?

MR. MOLANPHY: Yes, your Honor.

THE COURT: You mean you can recover from the stevedore and in addition you can recover from the Court Carpentry?

MR. MOLANPHY: Certainly, your Honor, but no more than I am obligated to pay to the plaintiff.

THE COURT: You mean they would have to share that, is that it?

MR. MOLANPHY: Correct.

THE COURT: I thought Mr. Hockett had a case he claimed yesterday which said that they could not share that.

MR. MOLANPHY: That would be as a result of a claim by the employer against Mr. Hockett, not as a result of a claim by the shipowner against two third-party defendants.

THE COURT: I see.

MR. TESTA: But the fact of the matter is, your Honor, that there is no basis for a sharing of indemnity here. There may be a basis for the shipowner's claim against ITO because if the jury finds that ITO didn't stow the beams properly, that would cast the shipowner into liability, but there is nothing they can find on

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behalf of Court Carpentry in this case which would impose liability upon the shipowner. So there is no basis for an indemnity claim against my client because this case is being tried on unseaworthiness only, your Honor. There is no issue of negligence or contributory negligence in this case.

MR. MOLANPHY: Your Honor, both Mr. Testa's office and our office were involved in the Mortonson and McLoughlin cases which involved this very principle. In both of those, plus the Hartnett case, which came from a different district, the plaintiff was an employee of a third-party defendant, which in both of the McLoughlin and Mortonson cases were Mr. Testa's client. We represented the shipowner in both of those cases. In each the plaintiff was found to be contributorily negligent by the jury and on the basis of that finding alone the trial Judge directed a verdict in the shipowner's favor on the third-party indemnity suit.

MR. TESTA: If your Honor please there were two issues in those cases. There were issues of negligence and unseaworthiness in the cases Mr. Molanphy is talking about. There is no issue of negligence in this case and that's the big difference here. We are only trying on unseaworthiness here.

THE COURT: Except that contributory negligence applies, doesn't it, to an unseaworthiness claim.

MR. MOLANPHY: Yes, your Honor.

MR. TESTA: Yes, but it would not affect the indemnity action against my client. That's the point, your Honor, because that contributory negligence in this case does not cast the shipowner into liability. That's the point I am making here. If we did something negligent that imposed liability upon the shipowner, I can say yes, then the shipowner would be entitled to indemnity here, but this is not possible under the posture of this case because there is only one way that the shipowner can be held here, and that's because of an unseaworthy condition, if the jury so finds, created by the stevedore. There is no other possible --

THE COURT: Well, anunseaworthy condition, which I gather he claims should have been remedied by your client.

MR. TESTA: Not by my client, no, sir, no maam.

MR. MOLANPHY: Your Honor, an unseaworthy condition can also be brought into play as the Crummedy case uses the words "B/ the negligence of someone else."

MR. TESTA: But not by my client, your Honor.

MR. MOLANPHY: Let me finish, please.

Theoretically in this situation it's quite possible that if the jury finds this unseaworthy condition, this to be an unseaworthy condition, and also finds that the plaintiff was contributorily negligent, then it would be his contributory negligence that brings into play this pre-existing unseaworthy condition and his negligence in bringing that into play must be attributable to his employer.

MR. TESTA If your Honor please, this is a completely fallacious argument because there is no way --

THE COURT: Just a minute, Mr. Testa.

Mr. Molanphy, do you have some case which says that Court Carpentry in this situation had a duty to go down there and make a careful inspection before sending its men down into the hold to work or was it permitted, as it did in this case, to make a cursory inspection to see if there were any obvious dangers? Do you have a case that says that they had that duty, because as Mr. Auletti testified , he made a cursory inspection. Isn't that right, he looked down from the top --

MR. MOLANPHY: He said he looked down from

the top.

THE COURT: He said he made a cursory inspection and he didn't think there was anything dangerous so he sent his men down there, is that right?

MR. MOLANPHY: Yes.

THE COURT: So there is evidence that he made a cursory inspection. Now, what you have to do is to produce a case which says that he had a duty to do more than that; that he had to go down there to make sure there were no hidden or latent defects before he can send his men down there.

MR. MOLANPHY: Your Honor, I have no such case.

I rely on Mr. Auletti's testimony.

MR. TESTA: But I do, your Honor. In the 39th request to charge, in Calderola against Counard, 279 F. Second 475; Vavvaro against Alcoa, 1968, 405 F. Second 1133; Sciarriallo against Fred Christenson, 206 F. Sup. 182; Ignatyuk against --

THE COURT: Just tell us what they said. I think that's enough.

MR. TESTA: These cases all say that a contractor like my client, Court Carpentry, has no duty or legal obligation to inspect a ship and discover and

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correct every latent defect or hidden dangerous condition that may have existed in the ship's gear or equipment before sending its men aboard and is not responsible for latent defects not discoverable by a cursory inspection and that's the law in this circuit, your Honor, and those cases all --

THE COURT: What do you say to that, Mr. Molanphy?

MR. MOLANPHY: I think the obvious answer to that, your Honor, is that it would then become a question of fact for the jury to determine whether or not Mr. Auletti should have seen this condition. All he said was that he didn't see it, and if I remember correctly he said that,"I wasn't even looking for spaces."

MR. TESTA: He did whatever he had to do, your Honor.

MR. MOLANPHY: It's certainly no latent defect. A space in a stow can't be latent.

MR. TESTA: His only duty is to make a cursory inspection and that he did and that complies with our warranty in this case. We don't have to check every nook and cranny in a ship and find every defect that exists on it. Once we made a cursory inspection we complied with our warranty and that's all we have to do. After that

there is absolutely no question that we performed the lashing and carpentry services in a workman-like manner in this ship. so there is no basis for an indemnity claim against my client, Court Carpentry.

MR. MOLANPHY: How does he explain Mr. Auletti's testimony that these men were down there for an hour working and never even came upon this condition?

MR. TESTA: It doesn't call for my explanation.

MR. MOLANPHY: I certainly think that the jury could infer from that that they should have within that hour found if there was a dangerous condition.

THE COURT: Let's stick with Mr. Auletti now.

MR. MOLANPHY: That's his testimony.

THE COURT: He is the one that would have the duty if he sent the men down there.

Now, if he looked down into that hole and he saw something which was an obvious danger, then of course he should not have sent his men down there until that obvious danger was corrected.

MR. MOLANPHY: Right.

THE COURT: By his own testimony, this was a four or five inch hole, isn't that so?

MR. TESTA: That's what he said.

MR. MOLANPHY: A four, five, six inch space that

ran the length of the beam.

MR. TESTA: He said four or five inch.

THE COURT: He said he couldn't tell whether it ran the length of the beam. But in any event he went down there and concluded that it was all right to go down there. He didn't make a detailed inspection by his own admission. So unless he had the duty to do that, then he did all that he was required to do.

MR. MOLANPHY: If he did an inspection and didn't see it I think that the jury is permitted to infer that he should have seen it, number one, and number two, I think the law is clear also that if the stevedore -- if the employer, through any of its employees, has knowledge of the dangerous condition, they should either correct the condition themselves or stop the work until the condition is corrected and that's the essence of the Necroli opinion and it concludes the plaintiff.

THE COURT: What were you saying?

MR. MOLANPHY: If the contractor, through any of its employees, including the plaintiff, has knowledge of a dangerous condition, then it has an obligation either to correct the condition or to hold up the work until the condition is in fact corrected and that's the essence of the Necroli opinion.

MR. TESTA: May I say something at this point, your Honor?

THE COURT: Yes.

MR. TESTA: The plaintiff's testimony, which is the only testimony in this case, is he looked down in that hold. He said he never saw it. He doesn't say he was down there for an hour. Mr.King said he went down there and he walked the length of the beam and he was only down there long enough to walk the length of the beam and he made a right turn and stepped in the hole. There is no proof that he was down there an hour andknew about this hole and should have told anybody about it. Mr. King's own testimony is that he never knew anything about it. He never saw it either before or after this thing happened.

THE COURT: You know we plan to submit special questions to the jurors so that we know the basis on which they render their verdict on this case. What question do you suggest goes to the jury with respect to Court Carpentry? Maybe that would clarify the discussion here.

MR. MOLANPHY: Your Honor, may I then move my initial request to clarify the jury situation with respect to Court Carpentry. I still contend that

there has been no jury demanded as between our parties -- our clients, and that there should be no question submitted to the jury as between Mr. Testa and myself.

MR. TESTA: If your Honor please, I have authority right here for that proposition.

THE COURT: With respect to that I have decided that that is a question left to the discretion of the Court. Court Carpentry having failed to demand a jury doesn't have it as a right, but since all these other issues have gone to the jury I think this one should go. I just want to know what issue we are sending to the jury, Mr. Molanphy. Do you want to frame it since this is your claim?

MR. MOLANPHY: I take it I am not permitted to say more on that question of the right to a jury?

THE COURT: No, I just ruled on it. It's up to the Court. He doesn't have it as a right, but the Court can in its discretion send it to the jury.

MR. TESTA: I have a case I would like your Honor to see.

THE COURT: I already reserved the question and reached that conclusion.

All right, what are we sending to the jury? How is the question going to be framed to the

jury? Maybe that will clarify this whole problem that we have been discussing with respect to Court Carpentry.

MR. MOLANPHY: Did Court Carpentry breach its warranty of workman-like service to the shipowner by virtue of its failure to discover any unreasonable conditions in the area in which its men were working.

THE COURT: Any obvious dangers, is that what you are saying?

MR. MOLANPHY: Yes, your Honor.

MR. TESTA: That would be an improper question.

MR. MOLANPHY: Reserving the question still of the plaintiff's own contributory negligence as being attributed as a matter of law to his employer.

THE COURT: Let's take one thing at a time. I understand contributory negligence. What I don't understand is what your claim is and how it should be framed to the jury here. Do you want to read back what he said, Mr. Reporter.

(Statement read.)

THE COURT: When you say unreasonable conditions, what do you mean by that? Dangerous conditions?

MR. MOLANPHY: Unseaworthy conditions.

THE COURT: All right.

Now, what do you say about that, Mr. Testa?

MR. TESTA: I say that is a completely improper interrogatory to go to the jury. The way the interrogatory, if you decide to let it go to the jury, should be framed, "Has the defendant, the shipowner in this case, established its claim that Court Carpentry breached its warranty of workman-like performance of the lashing and carpentry operation and that this breach of warranty was a proximate cause of the plaintiff's accident."

That's the way you would frame an interrogatory to go to the jury and I say under the facts in this case they have not established that claim because we did not breach any warranty and there was a complete and total failure of proof on the part of the shipowner here. They have not established their claim that Court Carpentry breached any warranty of workman-like performance of the lashing and carpentry operation or that that breach of warranty was a proximate cause of the plaintiff's accident. That is the whole purpose of my motion to dismiss and for a directed verdict, your Honor, because under the facts in this case it cannot come out that way, there is no way they can prove this and they haven't proved it.

MR. MCLANPHY: It sounds like Mr. Testa --

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THE COURT: Just a minute.

(Pause.)

THE COURT: All right, I will have to consider the proposals made by both sides with respect to the question that ought to go, but at the moment I have to rule on your motion, Mr. Testa, to dismiss the vessel-owner's case against you and that motion is denied.

Do you have any evidence that you want to put on?

MR. TESTA: Are you talking to me, your Honor?

THE COURT: Yes.

MR. TESTA: No, I do not, your Honor.

THE COURT: So that you would rest, is that it?

MR. TESTA: Yes.

THE COURT: I think, Mr. Hockett, you already indicated that you do not have any.

MR. HOCKETT: Yes, your Honor, but ITO rested previously.

THE COURT: Did you rest in the presence of the jury?

MR. HOCKETT: No, I don't believe the jury has been here all afternoon.

THE COURT: All right.

Mr. Molanphy, I don't recall whether you actually rested in the presence of the jury or not. I gather not because I think we recessed just as you completed reading something, but you didn't actually.

MR. MOLANPHY: I will do that, then, your Honor.

THE COURT: So what I think we will do now is to bring in the jury and each of the defendants, that is the defendant and third-party defendants will rest in the presence of the jury. Then we will take a 15-minute recess or 20-minute recess and then you will commence summing up to the jury, gentlemen.

MR. MOLANPHY: Does your Honor intend to charge the jury to night?

THE COURT: No, in the morning, but I think we ought to get underway with the summations.

(Jury present.)

THE COURT: Ladies and gentlemen, I am sorry for the delay, but perhaps I forgot to advise you during the time when I was giving you preliminary instructions that there would be times when you would be sitting in the jury room while we were here in the courtroom and

those are periods during which I have legal matters to discuss with the lawyers out of your presence. That is what we have been doing now since 10 minutes before 2. So that was the reason for your sitting in the jury room waiting, but that occurs in all trials and cannot be avoided. So I am sorry for the delay.

As you know, before you went to lunch the plaintiff had rested its case and the vessel had proceed with its case.

Now, Mr. Molanphy, do you have anything further on the vessel's case?

MR. MOLANPHY: No, your Honor. The defendant and third-party plaintiff shipowner now rests it case.

THE COURT: Mr. Hockett, does the stevedoring company have anything on its case further?

MR. HOCKETT: The third-party defendant ITO respectfully rests its case at this time.

THE COURT: All right, Mr. Testa, does the Court Carpentry Company have anything further on its case?

MR. TESTA: The third-party defendant Court Carpentry rests, your Honor.

THE COURT: All right. Now, ladies and gentlemen, now that all parties in this case have rested

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and all the evidence is in, we have come to that time when the lawyers will address you again, as I told you when the trial began and that they are going to do after they have had a brief recess. You have had quite a recess, but the lawyers have not. I will give them another 15-minute recess or a 15-minute recess I should say at this time, they haven't had one, to get their notes together and then they are going to sum up to you; that is give you their versions of what the evidence in this case shows or what it does not show from their point of view.

With respect to that, I want to remind you of something I said earlier, and that is that statements made by lawyers is not evidence. The evidence in the case again is the testimony which you heard from the witnesses, the exhibits which have actually been received in evidence and any stipulations or agreements as to certain facts which the lawyers entered into.

Did we have any stipulations in this case? I don't recall.

MR. SERGI: Yes, your Honor. The only stipulation we had is as to the medical expenses expended on behalf of Mr. King, and that was in the sum of $1,605.

THE COURT: All right.

We had one stipulation. That's the evidence

in the case. As I have said, the lawyers are going to give you their version of what the facts show. So we will excuse you again now until 3:45.

(Jury not present.)

THE COURT: With respect to the requests to charge, I am going to tell you now what I am going to charge the jury so that you will have an idea or will be guided by it in summing up to the jury. As I have told you, I plan to submit to the jury interrogatories which they will answer, and I have here a copy of a proposed interrogatory which I will hand to each of you.

What I plan to do, gentlemen, in order to avoid confusion, is to submit the interrogatories relating to the plaintiff's case against the vessel separately and then submit to the jury the separate documentrelating to the vessel's claim offer against the stevedore and the carpentry company.

Now, what I have handed you are proposed interrogatories relating only to the plaintiff's case against the vesesl.

MR. SERGI: We have the second claim, your Honor, I don't have the first.

THE COURT: Maybe he handed you the wrong

thing. Do you want to bring that back, Joe. Maybe you handed him the wrong thing.

No, wait a minute, are they all second claim?

MR. SERGI: Yes.

MR. MOLANPHY: Yes.

THE COURT: I guess we got confused in these papers. Do you want to bring them back?

I am sorry for the confusion. This relates to the plaintiff's case against the vessel.

MR. MOLANPHY: Your Honor, may I say something now?

THE COURT: Can you just look at the first? Let's take one thing at a time.

MR. MOLANPHY: Okay.

THE COURT: The next thing I am passing you is the question relating to the vessel's claim offer against the stevedore.

MR.TESTA: May we be heard on this?.

THE COURT: Just a minute. Let's look at all of them first.

Now I will hear you on the first proposed set of interrogatories relating to the plaintiff's claim.

MR. SERGI: Your Honor, the plaintiff accepts it, except I would like to bring to your Honor's

attention question number two, I am quite sure it's a typographical error, the word is not approximate, the word is proximate.

THE COURT: Yes, I gather that is a typographical error. Let's see what I did with the original.

Yes, proximate. It's a typographical error.

Is there anything else?

MR. SERGI: My other question is are these all going to be submitted to the jury at the same time or separately?

THE COURT: I said separately. I think this is exactly where I started, that I am going to submit first--

MR. SERGI: I understand, fine. Thank you. No objections.

THE COURT: Does anybody else have any questions on this?

MR. MOLANPHY: Yes, your Honor.

THE COURT : All right.

MR. MOLANPHY: I don't believe there is any testimony to the effect that Mr. King anticipated working beyond age 66, certainly, which he is today, and, therefore, I believe the question related to anticipated

future lost wages is inappropriate.

THE COURT: What do you say to that, Mr. Sergi?

MR. TESTA: As a matter of fact, if I may say something, your Honor --

THE COURT: Can we take one thing at a time? He said something and I asked Mr. Sergi to reply. Would you please let him reply.

MR. TESTA: I'm sorry.

THE COURT: What about that?

MR. SERGI: We do have the expectation of work expectancy, your Honor, but as your Honor does instruct the jury that that is solely a guideline, not necessarily that he will quit working at that particular time.

THE COURT: What did he say about working beyond this time, do you remember?

MR. SERGI: Yes. Mr. King said he would have worked except for the condition of his knee. He would have worked beyond 64, 65 or 66. That's my understanding.

THE COURT: That's my recollection of the testimony.

MR. SERGI: Now it becomes a question for the jury to decide whether he could have continued if

not for the condition of his leg and for how long.

THE COURT: Do you have something, Mr. Testa?

MR. TESTA: Yes, your Honor. The law in this circuit in the Cunningham case is, in a longshoreman case, is that work expectancy is to 65, your Honor, in this type of case, regardless of what his testimony may be. I will give your Honor the citation. This circuit has held in a longshoreman's case, work expectancy is to age 65.

THE COURT: Is he a longshoreman?

MR. SERGI: He is a marine carpenter, your Honor.

MR. TESTA: It's the same thing. He is a harbor worker.

THE COURT: We have to put in there -- we have to tell the jury what his work life expectancy is in the chart.

MR. TESTA: He already passed it. He is up to age 66 now, your Honor, and the law in this circuit --

THE COURT: He quit at age 62, is that it?

MR. MOLAMPHY: 64, your Honor.

MR. TESTA: He quit at age 64 in 1972, when he was 64, so at the most he would have had one year of work expectancy and I don't think the jury can go beyond

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that and I don't think they should be permitted to.

MR. SERGI: Your Honor, I think it's a question of fact depending upon conditions. In different occupations -- of course we all understand that --

THE COURT: It's a guide. They are not bound by it. I agree.

Is there anything else?

All right.

MR. MOLANPHY: Not on the first one, your Honor.

THE COURT: Have you got the second claim?

MR. MOLANPHY: Yes, your Honor.

THE COURT: I expect you will ask the same question with respect to Court Carpentry, except it will say Court Carpentry instead of stevedore in that question. I t would say did the Court Carpentry breach its implied warranty of workman-like performance in lashing the steel beams instead of in loading, but otherwise it would be thesame question except it would relate to Court Carpentry and it would say, "In lashing the steel beams."

Do you have something to say about those?

MR. MOLANPHY: Yes, your Honor. I would submit that if the jury in answering the first set of questions

holds the vessel-owner liable for unseaworthiness and that said unseaworthiness was the proximate cause of injuries in damage to the plaintiff, then it follows as a matter of law that the stevedore is liable in indemnity because its the party that created the condition which the jury found to be unseaworthy.

THE COURT: You mean you would move for a directed verdict against the stevedore at that point, is that it?

MR. MOLANPHY: Yes.

THE COURT: I wouldn't have to send that to the jury?

MR. MOLANPHY: Correct, your Honor.

MR. HOCKETT: If the Court please, I think the jury can certainly find that the stow was correct, but that the method and operation on the part of the co-third-party defendant created an unseaworthy condition independent, quite independent of anything that the stevedore did.

THE COURT: I guess that's true.

All right, anything else on these questions?

MR. MOLANPHY: Yes, and I would make the same application with respect to the proposed interrogatory concerning Court Carpentry; that should the jury find

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affirmatively on the issue of contributory negligence, there would be then no question to submit to the jury concerning Court Carpentry since that party --

THE COURT: The same answer applies.--

MR. MOLANPHY: Your Honor, now for the completion --

THE COURT:--as with respect to the stevedore.

MR. MOLANPHY: For the completion of my record, I would like to now renew all the motions that I made with respect to the plaintiff's case, also for a directed verdict against the plaintiff on the grounds that the weight of the credible evidence is to the effect that no unseaworthy condition existed aboard the vessel.

THE COURT: All those motions are denied.

MR. MOLANPHY: I would like then to move for a directed verdict against the third-party defendant stevedore on the grounds that should the jury decide that there is an unseaworthy condition it could only have come about through the efforts of the stevedore in the manner in which it stowed this cargo.

THE COURT: Let's wait and see what the jury does. I just ruled on that.

Does anybody else want to make a motion at the close of the entire case for the record?

MR. HOCKETT: Merely for the record, your Honor, I would join with Mr. Molanphy's first motion. Certainly not the one with the directed verdict against the third-party defendant, but the motion directed against the plaintiff's case.

I would also at this time wish to renew my motion with respect to the competency of the testimony of the carpenter foreman.

THE COURT: The record is clear as to that. Just renew your motions.

MR. HOCKETT: And that as a result of admitting this particular evidence as expert proof that t his defendant, third-party defendant has been irrevocably prejudiced and would therefore call for a mistrial on the basis of the admission of that particular testimony.

THE COURT: Do you have any motions?

MR. TESTA: Yes, your Honor. I would like to renew my motion to dismiss the complaint for all the reasons set forth in my original motion without restating them at this time and also renew my motion to dismiss the third-party complaint for a directed verdict

in favor of Court Carpentry for all the reasons set forth in my original motion to dismiss that complaint.

THE COURT: All right, motion denied.

MR. SERGI: Your Honor, for the record on behalf of the plaintiff I move for a directed verdict because the testimony and the evidence is overwhelming in that there was a space into which the plaintiff stepped and that the area was not reasonably safe and, therefore, the vessel was unseaworthy and the plaintiff is entitled to a directed verdict.

THE COURT: Denied.

MR. SERGI: I make a further motion, your Honor, that the allegation of contributory negligence that was made by the defendant shipowner here and it being the burden of the defendant shipowner to offer proof that the plaintiff was contributorily negligent, having offered no proof whatsoever has failed in its burden to prove that the plaintiff was contributorily negligent and, therefore, I ask the Court to hold as a matter of law that the plaintiff, Jackson King, was not contributorily negligent in the happening of this accident.

THE COURT: Denied.

MR. MOLANPHY: Your Honor, may I include among

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my motions one for a directed verdict against the third-party defendant Court Carpentry?

THE COURT: I thought we went over that before.

MR. MOLANPHY: That's the one I never got to make, your Honor.

THE COURT: I thought we did when you suggested that you were entitled to a directed verdict if the jury found for the plaintiff here. Isn't that the one you made awhile ago?

MR. MOLANPHY: I made those remarks, your Honor, with respect to the question asked of us whether we had any comments to make on the form of the questions. I don't think I phrased it in the form of a motion for a directed verdict.

THE COURT: All right, you can phrase it that way and it's denied.

MR. MOLANPHY: Thank you, your Honor.

MR. TESTA: Your Honor, may I be heard with respect to these interrogatories at this point? I would simply like to state on the record that the interrogatories your Honor proposes to address in connection with the shipowner's third-party action against my client should properly read, "Has the defendant

shipowner established its claim that Court Carpentry breached its warranty of workmanlike performance of the marine lashing operation and that this breech of warranty was the proximate cause of plaintiff's accident?"

THE COURT: You said that before.

MR. TESTA: I know. I am respectfully asking your Honor to submit an interrogatory -- one interrogatory in that form with respect to the shipowner's claim for indemnity against my client.

I am also asking your Honor to submit a further interrogatory to read, "Did any conduct of the defendant Hansa Line prevent the shipowner from recovering indemnity from Court Carpentry and Marine Contracting Company?"

Because I think the jury is properly entitled to make a ruling or a decision in connection with conduct precluding indemnity.

THE COURT: What conduct do you have in mind? Is that an issue in this case?

MR. TESTA: Yes, it certainly is an issue in this case because if the shipowner had inspected after the stevedore put these beams in there; if they had gone down there and inspected and found this space that would

have been the end of it right there, the accident never would have happened because our men never would have gone in there. I say that that's conduct precluding indemnity, that they had an obligation to inspect after the stevedores put the beams in the hold and before Court Carpentry's men went down to do the lashing.

THE COURT: No, I already ruled against that in the opinion I wrote up before.

MR. TESTA: That may be but I think it's an issue that I am entitled to go to the jury.

THE COURT: It's on the record. It's denied.

MR. TESTA: Exception, your Honor.

MR. MOLANPHY: Your Honor, are we summing up on all claims at the same time?

THE COURT: Yes.

Gentlemen, do you want to send back up the proposed interrogatory that I gave you on the first claim because we can use that except for the typographical error and the first page.

Gentlemen, I was going to tell you what I was going to charge the jury so you can be guided in your summations.

I am going to charge the jury on the plaintiff's burden of proof, credibility of witnesses and

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the doctrine of unseaworthiness. I will charge on expert witnesses. As I have said, on what constitutes unseaworthiness. Assumption of risk; that is that he does not assume the risk for even obvious dangers or conditions. Proximate cause. Contributory negligence and dangers, including discounting any award for future pain and suffering or future loss of wages to his present value.

With respect to the vessel-owner's claim offer against the stevedore I will charge the jury on the stevedore's implied warranty of workman-like performance and the same with respect to the Court Carpentry Company.

All right, suppose we take a five-minute break before bringing the jury in.

MR. SERGI: Your Honor, does your Honor expect to charge pretty much the same charge that your Honor charged in the prior trial except for the negligence?

THE COURT: No, I have gone and revised that because the last charge included negligence and so forth. So if you are asking if my charge is the same as last time, no, it's been completely revised.

MR. SERGI: This is because in your last charge your Honor made a statement in your charge to the jury as follows:

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"You have heard testimony on both sides of this case and some of it is conflicting."

Now, I object to the Court using a conclusion that the testimony was conflicting. I would rather the jury decide whether the testimony was conflicting or not. So if your Honor is going to charge that, I would like to --

THE COURT: You don't know of any conflicting testimony here?

MR. SERGI: Not that I know of, and if there was I think the jury is to make a determination whether there was any conflicting testimony rather than the Court telling them that there was conflicting testimony. It's a question of whether he stated one thing in his EBT and whether he stated another in the testimony. I think it's for the jury.

THE COURT: Didn't we have Mr. Molanphy read something which was conflicting with his testimony? Is that so, Mr. Molanphy?

MR. MOLANPHY: Yes, your Honor.

THE COURT: The last time you read from his EBT he said he walked down and he was looking -- did you read that?

MR. MOLANPHY: Yes, your Honor.

MR. SERGI: I know what he read, your Honor, and the problem is this. In my opinion what he read was not conflicting with the testimony as given here. Now, what I am suggesting is instead of adding to the defendant's position by stating to the jury that in the Court's opinion it was conflicting, I think it's for the jury to decide whether it was conflicting.

THE COURT: All right, I will tell them if they find any conflicting evidence they have to resolve it.

MR. TESTA: If your Honor please may I respectfully call your Honor's attention to Rule 51 of the Rules of Civil Procedure which requires that the Court shall inform counsel of its proposed action upon their request to charge prior to their arguments.

THE COURT: Did you hand up any requests to charge?

MR. TESTA: Yes, I did, your Honor.

THE COURT: I thought I was doing that in telling you what I was going to charge.

MR. TESTA: No, I think the rule says that the Court shall inform counsel of its proposed action upon --

THE COURT: I will go over yours and let you

know when we come back from recess.

MR. TESTA: All right. That will be before the summations?

THE COURT: Yes.

(Recess.)

(Jury not present.)

THE COURT: All right, I will go over yours now, Mr. Testa.

The following are accepted in substance: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

I don't think we have the temporarily unsafe condition here, do we?

MR. TESTA: It might be considered a temporarily unsafe condition, your Honor, this space . I don't think it was a permanent condition.

THE COURT: That's an incomplete statement of law in any event. That's rejected.

17 is accepted in substance.

MR. TESTA: 17 is granted, your Honor?

THE COURT: Well, as I told you, what I am going to charge is that the plaintiff does not assume even the risk of obvious dangers.

Now, that's the usual charge I guess that we give that I had reference to, that in every occupation aboard

ship there are some inherrent and unavoidable dangers. Are you familiar with that?

MR. TESTA: Are you granting or denying my 17, your Honor?

THE COURT: It's denied. What you are suggesting I gather is that I charge that he accepts ordinary risks of his occupation without explaining that he does not assume the risk of even obvious dangers. So that's denied.

18, 19 and 20 relating to negligence, which I gather we don't have any more.

MR. TESTA: That's correct.

THE COURT: The same thing with 21, 22, 23, 24 and 25. 26 is accepted in substance. 27, 28, 29. 30 is rejected.

MR. TESTA: Exception.

THE COURT: 31.

MR. TESTA: Exception.

THE COURT: Let's see, the next is 32. Accepted in substance. 33 is rejected.

MR. TESTA: Exception.

THE COURT: 34 is rejected.

MR. TESTA: Exception.

THE COURT: 35 is rejected.

MR. TESTA: Exception.

THE COURT: 36 is rejected.

MR. TESTA: Exception.

THE COURT: 37 is rejected.

MR. TESTA: Exception.

THE COURT: 38 is rejected.

MR. TESTA: Exception.

THE COURT: 39 is accepted in substance. 40 is accepted in substance. 41 is accepted in substance. 42, 43, 44 rejected.

MR. TESTA: Exception.

THE COURT: 45, 46.

MR. TESTA: Would your Honor mark my requests as a Court's Exhibit, please, for the record.

THE COURT: Yes.

What do you want it marked, Court's Exhibit 1?

MR. TESTA: Yes.

*** (Court's Exhibit 1 marked for identification.)

THE COURT: Bring in the jury.

(Jury present.)

THE COURT: Mr. Molanphy, are you ready to proceed?

MR. MOLANPHY: I believe Mr. Testa goes first.

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THE COURT: All right, Mr. Testa.

MR. TESTA: Mr. Sergi, Mr. Molanphy, Mr. Hockett and ladies and gentlemen of the jury:

We have now arrived at that part in the lawsuit where we lawyers are allowed to deliver what are known as summations and in which we are permitted to comment upon the evidence and to give you our views as to what we think the evidence in this case shows.

Now, you will recall at the outset of this case we spoke to you in a certain order and now we are speaking to you in the reverse order and that is because the plaintiff, Mr. Jackson King, has the burden of proof in what I described to you, ladies and gentlemen, in my opening as action number one. He has the burden of proving that the vessel in this case, the Trautenfels, was unseaworthy and that that unseaworthiness was the proximate cause of his accident and the injuries which he sustained for which he is seeking a verdict at your hands.

Now, that's the only issue in case number one. As you know, there is no question of negligence being submitted to you. There is only one issue in Mr. King's case against the shipowner, and that is whether or not the vessel was seaworthy.

Now, Judge Motley will give you a definition of seaworthiness in her charge and I am not going to charge any further upon that, that's the function of the Court to tell you what the law is with respect to seaworthiness, but that's the issue and Mr. King had the burden of proof on this. He has the burden of proving to your satisfaction that the vessel was unseaworthy and that that unseaworthiness was the proximate cause of this accident.

Now, what proof was offered on behalf of Mr. King on the question of unseaworthiness of this vessel? First there was his own testimony. Now, you will recall that Mr. King testified that he went aboard this ship on June 18, 1968, at which time he was 60 years old. He was born April 2, 1908. He said that he was sent down into this hold -- first he was sent into the number 1 hatch where he did some lashing work and then he was sent into the number 4 hatch to do some lashing work.

Now, I just want to remind you as I said in my opening statement to you, there are three, really three separate actions here. This is action number one. Action number two is the action by the shipowner against ITO, Mr. Hockett's client here, to recover indemnity from them, because they did the loading work. ITO put the steel

beams in the hatch and created this space which the plaintiff says rendered the ship unseaworthy. That's action number two.

Action number three is the action by the shipowner in this case against my client, Court Carpentry, in which he is saying that we did something wrong here; that we did not perform the marine lashing and carpentry services in a workman-like manner and, therefore, if you ladies and gentlemen decide to bring in a verdict in favor of Mr. King, that he is entitled to get that money back from my client. As I told you at the very outset our position is that he is not entitled to get any money that you may award Mr. King as against the shipowner back from my client because it's our position that we did perform the marine lashing services and carpentry services in a workman-like manner. That was our sole obligation in this case. We didn't come aboard this ship and do this stowage of the steel beams. That was done by ITO. Our sole obligation in this case was to perform the marine lashing and carpentry services in a workman-like manner and I say to you we did perform these services in a workman-like manner.

There is not one shred of evidence in this case which would indicate that Court Carpentry did not

perform the marine lashing and carpentry services in a workman-like manner. Nothing. No witness testified that we did anything wrong as far as marine lashing and carpentry was concerned, and that's all we did on the ship.

Mr. King didn't say that we did anything wrong as far as the marine lashing and carpentry is concerned. Mr.Auletti didn't say it. These were the only two witnesses who testified live. There was a deposition read by Bob Pinto, who is International Operating Company's hatch boss. He didn't say that we did anything wrong as far as the marine lashing is concerned or the carpentry. His testimony consists of his statement and admission that ITO did the loading of these beams into this number 4 hatch and that there was a space there; that he tried to put them as close together as he could, but nevertheless there was a space of some three to four inches. That was his testimony.

I say to you again there was not one word of testimony from that witness stand that my client Court Carpentry failed to perform the marine lashing services or the marine carpentry services in a workman-like manner. So there is a complete failure of proof there.

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Now, taking action number 1 on the question of unseaworthiness, what was the proof that was offered on behalf of Mr. King that this vessel was unseaworthy? The only testimony here is that there was a space; that he went down into this hatch and his foot went into a space between the beams. That's all. Nobody got on the witness stand and said there was anything wrong with that, that it was dangerous or improper or unsafe. Nothing. Not one witness said that there was anything wrong with beams being stowed with a space.

So all you have in this case on the question of whether or not this vessel was unseaworthy is Mr. King's statement that his foot went into a space between two beams.

Not one word by any witness that that's an unsafe place to work, an improper storage condition, an unsafe condition of any kind. Now, remember that Mr. King has the burden of proving that his condition was unsafe, was defective, was improper, not just that there was a space there, and I say to you, ladies and gentlemen, that all he proved in this case was that there was a space there and his foot went into it.

There isn't one shred of testimony in this case that there was anything wrong with that, that it was

improper or an unsafe place to work or a defective condition of any kind.

So I say that he has not sustained his burden of proof which he must sustain in order to get a verdict at your hands that this vessel was unseaworthy in any manner, shape or form. Mr. Auletti testified that he was the carpenter foreman on the day this accident happened. He said he looked into that hatch. He didn't see anything wrong there. He didn't see any space. Bear in mind that his duty and obligation was merely to make a cursory inspection. He came aboard as a carpenter foreman. It was not his job to go and search out this ship and look in every nook and cranny to see if there was something wrong anyplace. All he had to do was make a cursory inspection, look into that hatch and if it looked all right he was perfectly justified in sending his men down there and he did that. He looked into that hatch and he didn't see anything wrong with it.

As a matter of fact, he said that the hatch looked perfectly safe to him or he wouldn't have sent the men down into that hatch. He would not have sent Mr. King in if he thought for a moment there was anything unsafe or improper about it. So he complied with his duty, and that was his duty, to make a cursory inspection

before sending the men down there. He did say that he saw a space there afterwards, after the accident happened, but he said on two or three occasions, on cross examination by Mr. Hockett and on cross examination by me, that there was nothing unusual about such a space. Not only did he say it once, but he said it several times, that he saw spaces like that many times and it was perfectly proper and customary and there was nothing unusual about that . So that not only do we not have any testimony in the plaintiff's case to the effect that there was anything improper or dangerous about this condition, but to the contrary, we have testimony by plaintiff's own witness that there was nothing unusual or improper or dangerous about having a space between beams that are stowed in the hold of a ship.

Now, you have to remember as was pointed out to you that the hold of the ship is about the size of this room. The beams are pretty long. They are anywhere from 40 to 50 feet long. They were put in there by a crane and they were lowered down -- this is not done manually. They were lowered down by a crane that had a boom and falls and they were put down into place that way.

When Mr. King finally did go down into that hold his job was to do the lashing. After the booms are

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put in by the stevedore, the lashers go in there to lash. You will recall that Mr. Auletti said that first they lashed and then after they get through with all the lashing operations, if there is any space left then they take lumber, a 4x6 piece of lumber and chocked it. Chocking means they take a piece of lumber and put it crosswise between the beams if there is any space to keep them from moving around. It does not mean that they filled up the space. They never fill up the space, they just chock the space so that the beams remain stationary and they don't swing around during the course of a voyage. That was the obligation of my client after the beams had been stowed, to lash and chock. We never got to the point of chocking because Mr.King went down to do the lashing first and he never got to do any lashing either because you will recall that his testimony was that he went down to the forward end of the number 4 hatch and came down onto the beams themselves. He said there was a five-foot walkway there and there was nothing wrong with this walkway at the point where he came down, which was at the forward end. There were no spaces there. He said so in his direct testimony.

He said where he stepped off the ladder these

H-beams were all right; that he didn't see any spaces where he was walking. He said he had no trouble walking down this three-foot aisle from one end to the other. It was only when he got to the other end, which was the after end or the back of the hatch, that he made a turn to the right and at that point when he made a turn to the right he said he stepped into a space which he never saw at any time. His testimony was that he never saw the space before he stepped into it and he never saw it after he stepped into it.

Now, you don't have to rely on my recollection of what the witness said. It's your recollection that governs. I mean, I wrote down what they said because I don't rely upon my recollection, but this is only my recollection of what Mr. King said. So he never got to do any lashing. He never saw the space that he stepped into at any time.

Now, I know there is going to be a lot of talk about contributory negligence after I sit down. You are going to hear from Mr. Hockett and Mr. Molanphy and they are going to tell you all about contributory negligence. They are going to say it was his own fault, but I say to you there was no contributory negligence in this case. Mr. King did not

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deliberately step into a space. He wouldn't have stepped in it if he knew it was there, that was obvious. He did not know it was this and this is not out in the main deck in broad daylight, this is down in the lower 'tween deck, which is some 12 feet below the main deck.

Nobody wants to hurt themselves and I say to you that he did not deliberately step into a space. He didn't know it was there and his testimony is that he never saw it either before the accident happened or after it happened. So I say there was no contributory negligence in this case and I ask you to bring in a finding to that effect.

You will be given some questions at the end to answer and I ask you to find that there was no contributory negligence on the part of Mr. King. However, the question still remains of whether there was any unseaworthiness on the part of the vessel-owner. It's not just a question of contributory negligence. Mr. King must first prove that this space which he says was there and which he says he stepped into made this vessel unseaworthy. That's the question for you ladies and gentlemen todecide.

Now, I say to you that on the testimony in this case there is no proof that that space was a defective

dangerous condition or an unsafe place to work. However, the question is going to be submitted to you to determine.

Now, if you find that that space was a defective or dangerous condition or did constitute an unsafe place to work and you decide to bring in a verdict in favor of Mr. King against the shipowner, bear in mind that that space was created by International Terminal Operating Company, not by my client. My client is Court Carpentry in this case. We had nothing to do with the loading of these beams and we had nothing to do with the creation of the space so that if you do decide in favor of Mr. King against the shipowner, that would only be because of something that ITO did in creating a space which you might find made this vessel unseaworthy.

As far as my client is concerned, as I said before, there is no breach of any warranty of workman-like performance on behalf of my client. We didn't create this space and we are not responsible for that space. As a matter of fact, we didn't do or fail to do anything which could have caused or contributed to Mr. King's accident in any manner, shape or form.

I indicated to you at the beginning of this case that I didn't think we should be in this case and I would come back at the end and ask you to let

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my client out and at this point I am giving you reasons why I think you should let my client out of this case. Obviously if my client did not create the space into which Mr. King stepped, obviously it could not be our fault. We did not do this and we did not do anything that would make the ship unseaworthy in the first place and this is the only way the ship can be held to be unseaworthy, in this case, is because of this phase, because there was no other testimony in the case that anybody else did anything which would make this vessel unseaworthy. The only testimony in this case is that there was a space there and if you decide that that space made the vessel unseaworthy, I say to you we are not responsible for that because we didn't create that space. ITO put the beams in there and if they created the space there, that's not our fault. We can only be held responsible for something that we did and we didn't do anything in this case which would in any manner, shape or form cause or contribute to the happening of Mr.King's accident.

Basically this is not a difficult case. It's a question of responsibility, who was responsible if anybody here, for Mr. King's accident, or is he responsible for himself? It's a question that you have to decide.

He had an accident. The question is is anybody responsible for it, and if so, who is responsible for it. Who created the condition which caused his accident. Now, you have certain guidelines here. You heard the testimony of the witnesses. You heard Mr. King. You heard Mr. Auletti. You heard Mr. Pinto by deposition. That's all you have to go by. On the question of liability, it's a very simple matter. As I see it, the fact that a space was there did not make this vessel unseaworthy and in the absence that any proof that that space constituted a dangerous, defective condition or an unsafe place to work, there has been a failure of proof by the plaintiff on the first action.

On the second action you have to decide the case of the shipowner against ITO and the shipowner against my client. These are all going to be submitted to you. Not all at the same time, but in stages. I have indicated to you why I think the shipowner is not entitled to indemnity from my client, and I don't think I have to pursue that any further. I think it's quite obvious, that if we didn't do anything to cause this accident we are not responsible for it. They are not entitled to get back any money that you may award Mr. King as against the shipowner.

I am only talking about my client. Mr. Hockett will speak for his client and Mr. Molanphy will speak for the shipowner, but I am just trying to tell you what my position is in this case.

Now, if we get to the point to damages if you decide you are going to award Mr. King some damages, then the question is what are the damages in this case.

Now, there is no question that Mr. King was 60 years old at the time that this accident happened and is 66 today. He is beyond the point of work expectancy. The average man works to age 65 and after that retires and collects social security, so he is already beyond that point now. But he did say that this accident happened in 1968 and that he tried to go back to work several times. After about three months he tried to go back to work for awhile and then couldn't make it and he tried to go back to work several other times too, and he couldn't make it, and then he eventually decided that he couldn't work any more, but the significant thing involved here is that no doctor told him that he couldn't work any more as a marine lasher. He just decided that he didn't want to work any more.

At that point he was age 64. A lot of people at age 64 don't feel like working either, which is

understandable. But Dr. David Smith came in here, and you saw Dr. Smith and you observed his demeanor on the witness stand I am sure. He saw Mr. King on three separate occasions. He saw him for the express purpose of coming to Court and testifying that Mr. King had a permanent condition of the left knee. That's the only reason he examined Mr. King. He didn't give him any treatment. He didn't even recommend any treatment to Mr. King. He came here for the sole purpose of this litigation and to tell you that Mr. King can't do any work involving climbing or standing.

You will recall that I went over the question of the operation with him, the operation that Dr. Tagliagambe performed. He said that Dr. Tagliagambe did a good job, that he performed the operation correctly. That it's medically and surgically correct. He agreed with me also that this is an operation that many atlethes have. It's a knee condition and most ball players get this injury. It affects the cartilage of the knee and they have it removed and they go right on playing ball. Of course he said these are young men and Mr. King is an older man, but he agreed with me that in the majority of the cases that after an operation of this kind the men do go back to work.

In this particular case Mr.King chose not to go back to work, but not because any doctor told him that he couldn't. That was his own voluntary choice.

Now, this is what you have to take into consideration. There is no question that he had an accident. There is no question that he had an injury. There is no question that he had an operation. But the question is is it somebody's fault, first of all. If you decide in the first instance that the vessel was not unseaworthy, then you don't have to go to the question of damages because before you can award Mr. King any money damages you must first decide that this vessel was unseaworthy and that somebody is responsible for this accident, because if this vessel was not unseaworthy and nobody was responsible for this accident, it doesn't make any difference what kind of an injury he had, he is not entitled to a verdict at your hands.

Now, if you get to that point, though, and you decide that he is entitled to damages, then I want you to take into consideration that we are only talking about a few years ago. We are talking about the years between when this accident happened in 1968 and when he decided to retire two years later. We are not talking about projected damages way into the future here. We are

not talking about lost earnings until he arrives at the age of 99 or pain and suffering or anything else. We are talking about a few years here and this is what your thinking should narrow in on. He had a few years disability. He had an operation. The question is whether he can work or not. So I want you to take all these things into consideration when you go into the jury room and decide first of all whether you think that the vessel was unseaworthy; whether you think that this space on this ship made this vessel unseaworthy, created a dangerous, defective or unsafe condition and whether that was the cause of the accident and then exactly what are the damages, what are we talking about? We are talking about a knee injury with an operation and a few years of disability. We are not talking about a tremendous period of disability here.

Beyond all that if you do get past that point and you decide that he is entitled to some money from the shipowner, I say again that the shipowner is not entitled to get that money back from my client because we were not responsible for the condition which caused the accident. We did perform the marine lashing services in a workman-like manner and if you do get to the point where you award damages to Mr. King, I say that the ship-

owner is not entitled to get it back from my client and I ask you to bring in a verdict in favor of my client, Court Carpentry.

Thank you.

THE COURT: Thank you, Mr. Testa.

Mr. Hockett.

MR. HOCKETT: If it please the Court, Mr. Sergi, Mr. Testa, Mr. Nolanphy, madam forelady, ladies and gentlemen of the jury:

Mr. Testa did a pretty good job of summing up certain of the factual aspects of this case and I am hopeful that I will not be too repetitious as to what has taken a relatively short time to try. The testimony from the witnesses on the stand are fairly fresh in your minds and the facts of the case I think are fairly simple.

I would like at the outset to thank you all for lsitening attentively and for your patience in the number of occasions when you were sent out of the courtroom. I can understand that probably is a trying situation.

But to get to the point which I feel is germane in this particular case, and that is the testimony of theone man who really had any knowledge, alleged

knowledge in the type of operation which the plaintiff, Jackson O. King, was engaged in, that's ship's carpentry, lashing, chocking, or the area of ship's work that involved cargo operations after the ship has in fact been loaded by stevedores.

You understand the stevedore, ITO, International Terminal Operating Company, if you will, did the loading. They are the ones who take the cargo from the dock and actually, physically place it on the ship. In this case we are talking about I-beams and mention was made of booms that were sitting on top of I-beams. But that had been completed to the extent that the longshoremen could complete it when the lashers came aboard.

Now, you have to understand that the loading operation is done in several steps and the actual physical loading of the cargo and then what comes after, the lashing or making sure that the cargo does not shift when it's at high sea, to which is included chocking and operations like this. So at the time we are talking of now when Mr. King went down into the number 4 hatch to perform his function, and it has been already alluded to, the stevedores, had actually completed the loading of the I-beams.

They do not, incidentally, parenthetically,

do the work together. One comes down first, does their job, and then the lashers come down and do their job.

Now, getting back to what I feel is the significance of Mr. Auletti's testimony. Mr. Auletti, you will remember, is the foreman of the group of men who was collectively called lashers and as foreman he has a number of years of experience in lashing and in chocking. There is no testimony that he has any experience whatever in longshoring or that aspect of the loading of a ship, the actual physical putting of cargo on the ship, but lashing I think we can all concede he has knowledge of, having worked in the trade for some 20 or more years.

Now, when he sent his men down to work on the day in question he made the cursory inspection that Mr. Testa alluded to and felt from his experience that the stow, the iron beams, was proper and it was okay to let his men go down and work. Then he let his men go down and work because he found nothing wrong at this point. In testifying on the stand yesterday Mr. Auletti indicated that it was not uncommon, in fact it was a customary occurrence to find gaps and holes in the stowed cargo. This is part of the nature of the work. As a matter of

fact, the lashers go down and part of their function is to plug up these holes with chocking, putting pieces of wood in between the gaps in the cargo to make sure that they don't shift.

Now, what's the significance? The significance I think is fairly clear. It's clear enough. Part of the functions of the lashers is to do the work of chocking these I-bemas in this case where they find occasional gaps between the two beams, two or three beams.

So it's an expected -- it's a normal procedure. It's something that Mr. Auletti is aware of and it's something I am sure that lashers, Mr. King included, were or should have been aware of. It's part of their job to fill in these gaps. That this is a normal operation involving the cargo operation of the ship was testified to by Mr. Auletti.

Now, it's important in that the plaintiff has claimed that the presence of these gaps, or one gap only, really, rendered the ship liable to the plaintiff in unseaworthiness, which the Judge will explain to you.

Now, if this were so, every time there was a gap between the cargo down in the hold of a ship you have an unseaworthy condition. I submit to you that it's

unreasonable and it's certainly not in conformity to what the testimony has been. This is a common condition. It's one that is normally to be expected in a ship and it's something for which Mr. King is employed to correct insofar as to make sure that the cargo doesn't shift. So the gaps are there. They are a common fact of life in loading a ship, including cargo of beams.

Now, you recall the testimony that the beams in question were some 70 feet long, they were approximately 12 feet across and another two feet down to the floor. Although there is no direct testimony as to how much they weigh, they weigh somewhere between two and five tons. In the deposition of the hatch boss of ITO gang, he indicated that the ship's winch and boom could handle up to five tons. We are dealing with a heavy commodity. Each one of these beams weighed a tremendous amount and the only way you can get these beams into a hatch or hold are by means of winches and cranes and they are placed in the hold as close together as humanly possible, and there was no testimony that they were scattered hither-thither or yonder or that the stow, if you want to call it, was replete with gaps and holes.

This is not the testimony. No one has ever suggested that the stow was completely replete with all

kinds of gaps and holes, such as would constitute an unseaworthy condition. We are not dealing here with a sloppy stow, or one which is patently or obviously defective. We are dealing here with the normal stowed cargo done within the accepted standards of the stevedoring trade, for which out of necessity or out of practicality you cannot cure every possible gap along the 70 foot length of beam. And as was testified, and no one has contradicted it, the lashers, part of their job is to go down and plug these holes.

This is a normal and expected occurrence. Insofar as action number 1 is concerned, the plaintiff, Mr. King's case against the ship, suggesting that the ship is liable in money damages for Mr. King's injuries on the basis of the fact that there was a hole -- a hole. Only one has been testified to or a gap between two of these beams is woefully insufficient and does not meet the generally recognized standard for unseaworthiness, which her Honor will charge you tomorrow morning. That's number one.

I might say parenthetically also that no one has denied that working aboard a ship in the capacity of a longshoreman or a lasher or a carpenter is not dangerous work. It's dangerous work. I believe Mr. Auletti

testified to the effect that it was dangerous work. But the fact that it's dangerous work by its very nature and that on occasion someone gets injured is not to suggest that the injury or the danger inherent in the type of work being done is the responsibility or is caused by anybody's carelessness, want of care or any other word you want to say. Be it as it may, as far as action number 1 I join with what comments Mr. Testa had made to suggest to you all the condition described by Mr. Auletti and the condition described by Mr. King does not fit the definition and as far as the shipowner is concerned, there is no liability. That's the primary concern that you have.

Secondary, and it would only come into play then, is the action that the shipowner has against the stevedore ITO and I would suggest to you that the facts as established on the direct case by the plaintiff against the defendant are insufficient and likewise the same testimony is insufficient to show any want of care on the part of the stevedore. Again from the testimony that has been adduced, both live and the testimony of the hatch boss, there is absolutely no testimony that the job of putting these beams down into the number 4 hatch on the day in question was done otherwise than the

proper and acceptible method. Again, the mere fact that the plaintiff had an accident is not indicative of carelessness on the stevedore's part. Again, the Judge will charge you as to what the law is and I think once she does you will understand exactly what this case is about and how the facts will fit in.

Now, finally -- I only bring up this in passing and suggest to you that you will not get to this point at all insomuch as I feel from the facts you, the jury, must find for the shipowner, is what was the actions on the part of the lashers who were sent down into the hatch and were these actions such as would constitute negligence on the part of Mr.King and/or his co-employees.

Now, you have heard the term breach of workman-like performance. This I suggest to you simply means any of the work done by the lashers in this case that would constitute a hazard or a danger, whether it be the actual lashing of cargo or of the steps that are necessarily taken preliminary to doing the actual lashing.

Now, what do I mean? If the shipowner was found liable to Mr. King for an unseaworthy condition, then I suggest to you that the responsibility in that case rests in part on Mr. King himself and in part on his co-employees and on his supervisor, Mr. Auletti.

Now, Mr. Auletti testified that in his 20 or so years of experience he has experienced and expected to go down to a hatch or a hold and find cargo with holes or other gaps in it for which part of his function is to chock. Now, with this known expectation and with the experience that he had, I don't think anybody can say but that not to expect it or not to caution his men that these conditions do exist is careless on his part. Likewise, Mr. King, who has been a lasher for six years or so, would also expereince holes in the stow because of the nature of the cargo stowed down there and would also necessarily be chargeable or should be chargeable with the responsibility of watching out for his own safety.

Now, Mr. King indicates that he went down into the hold and walked along these I-beams and found there was nothing wrong until he got to the end and he turned to the right and he fell into this hole. He says he never saw the hole, he never really even looked for a hole.

Now, I say to you, if with a background of a carpenter-lasher, part of whose function is to go down and chock gaps in the cargo and he goes down and he doesn't look for that which he did expect or should have expected from his experience and he steps into a hole, then I suggest

to you that he did not see what was there for him today if he were but to look. Mr. Auletti likewise had the responsibility, I submit to you, to advise his men and to make an inspection in light of his testimony that this was a normal condition. So, without belaboring the point, I feel that, number 1, the shipowner is in no way responsible or has any liability.

Number 2, I don't feel that the stevedore who loaded the beams down in hatch number 4 is liable or responsible for anything that happened, for the simple reason that there has been no testimony that this was done in any way but in the proper method and that it was a normal expectation to have such holes or crags between the beams, and thirdly if your decision is such that you find in favor of Mr. King, then I feel Mr.Ki own conduct or want of looking after for his own safety, in light of the fact that he should or could or knew and expected to find the condition of gaps in cargo for which he was sent down in part to correct, then I submit to you that Mr. King was negligent himself and that his co-employee Mr. Auletti was also negligent in not advisin or warning or taking the proper precautions prior to goir down into his hold or allowing his men to go down into his hold.

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I have said enough. The afternoon is growing late. Once again, I thank you for your kind attention in this case.

Thank you.

THE COURT: Thank you, Mr. Hockett.

We are going to recess now until 9:30 tomorrow morning. The jury is excused.

Please be here on time, ladies and gentlemen, at 9:30 in the morning. After the other lawyers sum up the Court will charge the jury and then you will retire to the jury room to deliberate.

(Adjourned to 9:30 a.m., October 11, 1974.)

* * *

JACKSON O. KING,

vs.

DEUTSCHE DAMPFS-GES, 68 Civ. 3374

vs.

INTERNATIONAL TERMINAL OPERATING CO., INC.,
and COURT CARPENTRY & MARINE CONTRACTING CO.

October 11, 1974.
9:30 a.m.

(Trial resumed.)

(In open court - jury not present.)

THE COURT: Mr. Hockett, do you have some reason for not being here at 9:30?

MR. HOCKETT: Yes, the Long Island Railroad, Judge. It was a little late this morning.

THE COURT: Let me tell you this: If you ever appear before me again and you are not here on time you are going to be held in contempt of Court. Do you understand that? Leave home in time to give the railroad a chance to be late because it's always late.

MR. HOCKETT: Well, Judge, if I take an 8:15 --

THE COURT: I am not going to hear any argument. I am just telling you that I set this case for 9:30 for a reason as you well know. It was your duty to be here if you had to leave home at 5:00 in the morning. The rest of us suffer the same thing with the subway, but we

get up early enough to get to work on time.

Now we have Mr. Testa who is not here.

MR. TESTA: Good morning, your Honor.

THE COURT: Do you have some reason for not being here at 9:30, Mr.Testa?

MR. TESTA: I was here, your Honor. I was outside. I was just in the men's room. I am sorry if I --

THE COURT: You are 15 minutes late.

MR. TESTA: Yes, your Honor.

THE COURT: The clerk looked for you and you were not outside.

MR. TESTA: I was outside with Mr. Molanphy and Mr. Hockett. I think they can --

THE COURT: I just told Mr.Hockett if you ever appear before me again and arrive late to Court you are going to be held in contempt of Court. Do you understand that?

MR. TESTA: Yes, maam.

THE COURT: You can wipe that grin off your face, Mr. Hockett.

MR. HOCKETT: There is no grin, your Honor.

THE COURT: Bring in the jury, please.

(Jury present.)

THE COURT: Good morning, ladies and gentlemen.

At this time we are going to continue with the summations by the lawyers.

Are you ready to proceed, Mr. Molanphy?

MR. MOLANPHY: Yes, I am , your Honor.

Your Honor, counsel, madam forelady, ladies and gentlemen of the jury:

Initially at the outset I would like to thank you on behalf of my client, Hansa Line, for your attention and patience during the course of the trial.

If you recall at the opening of this case I mentioned to you that the shipowner's personnel had nothing to do with the loading and securing of this particular cargo that we talked about on June 18, 1968 and I believe that that testimony has borne that out as being true.

As a result, there were no witnesses produced on behalf of the steamship company. The incident was reported to one of the officers of the vessel after its occurrence. He gave first aid to Mr. King and a notation to that effect appears in the log book, a copy of which was read to you by Mr. Sergi.

It's been a relatively short trial, so I will try to make my comments brief, but at the same time I would

like to review with you what I considered to be the important testimony that came out during the course of this trial.

The claim is and always has been that the vessel, the Trautenfels, was unseaworthy because of an alleged improper stowage of certain cargo in the shelter deck of hatch number 4. The question that will be presented to you now is has Mr. Sergi on behalf of Mr. King proved that allegation.

The testimony of Mr. King was to the effect that he, a marine carpenter of many years experience on the waterfront, accustomed as he was to working on a variety of surfaces, none of which -- and I believe you will recall that he testified that none of these surfaces are like the floor of this courtroom. They present boxes, cartons, crates, various types of cargo, and I believe he mentioned some leaving spaces such as those two chairs in front of the jury rail. So the idea of spaces in cargo is certainly not unusual, not unexpected by men in Mr. King's trade.

Mr. King testified, I believe, that he stepped into a space between two beams of cargo, this space being approximately four to five, possibly six inches wide. That was the only space that was seen by anyone in this

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entire stowage of cargo.

His supervisor, Mr. Auletti, said that he looked into this particular hatch before sending his men down. I am sure that if Mr. Auletti had seen a dangerous condition he would not have sent his men down.

Mr. Auletti, too, said that it's not unusual, it's not unreasonable, not dangerous to have spaces in between cargo, and I think that appeals to reason because if that cargo was so tight so that there were no spaces between anything, there would be no need for lashers and carpenters to go down there in the first place. This cargo would be compact and ready for a voyage at sea without the lashers, without the carpenters. I don't think you can judge stowage in a vacuum, because truly the stowage is not complete until this cargo has been lashed and the carpenters have concluded their work. That is the time for you to judge propriety of stowage, really. You can't take it halfway along and say, "Woops, at this minute there is a dangerous condition." I don't think that is reasonable or fair.

Now, was this a reasonable condition, aside from the testimony of both Mr. Auletti and Mr. King? You had read to you the deposition of a Mr. Pinto, who was the hatch boss of the stevedoring company which put this

cargo into the stow. He said he did what he could with these massive beams to get them as close up tight as possible and to leave as little in the way of space as possible.

In thinking over the testimony, a thought came to my mind, and it was this, that first of all those steel beams had been stowed in the hatch by the longshoremen. There is no question about that. But then we heard a lot of testimony about boom cranes and boom parts that were on top of that.

Now, who put those in? It had to be the longshoremen. Now, that means that an entire longshore gang, under Mr. Pinto, worked for I don't know how long putting in those crane and boom parts and they are all walking and working on this same surface of beams that Mr. King says was dangerous.

Now, does it appeal to your reason that this stevedore hatch boss and all of these eight holdmen in his gang would work and walk on a surface that they created that was dangerous? I just don't think it appeals to reason. I think it appeals more to realize that the work on the waterfront involves cargo that is stored in what could be classified as a huge storeroom and they don't expect to have a ballroom floor; that if they do

come upon a space, the carpenter has a procedure, it checks these spaces. Everyone expects these conditions and what have we heard? We heard of one space in the entire stow. That's all we heard of.

I mentioned, too, at the outset that I thought that Mr. King was either wholly or in large part responsible for his own accident.

Mr. Auletti has told us that nine out of every ten jobs on the waterfront is dangerous, and I think that appeals to reason, too. Mr. King, then, is obligated in his experience to exercise care for his own safety.

When I first took Mr. King's testimony back in 1969, a portion of which was read to you, Mr. King described walking down this center aisle and his footgoing into a space in the stow. So I was rather surprised at the trial to hear Mr. King say, "Well, no, I walked a certain distance along that stow and then made a right-hand turn and then I stepped in the space in the stow."

It dawns on me that he does that to mitigate any fault on his own part that he himself should have seen this one space which he alleges was dangerous. Of course if it was in the aisle as he was walking toward the other end of the hatch, all of us can agree that

he should have seen it and should have avoided stepping in the space that was only four or five inches wide.

I submit to you, therefore, that Mr. King's testimony as originally given at the time of his deposition in 1969 is a bit more accurate than the slight change that was obvious from his testimony here at the trial. Again, if we think about it for a moment that I think that again appeals to reason because had Mr. King walked down this aisle and made a turn so that his left foot went down into a space between the stow, a five-inch wide space, I suggest that the average adult male's foot doesn't go into a space that is only five inches wide if he is facing across that space.

Granted if he was walking along the length of the beams and there was a space five inches wide the width of his foot could go in, but I suggest that the length of his foot could not. So if he did step into this space that was open and obvious, certainly he is substantially at fault for the accident which ensued.

I think now that the testimony of the three people that we heard, Mr. King, Mr. Auletti and Mr. Pinto by deposition was all to the effect that men working on the waterfront realized that these conditions exist, they have to. As you put in one piece of cargo, that creates a

space beside it. Spaces are customary, and expected on the waterfront and do not in my estimation constitute unseaworthiness as her Honor will charge you.

There is no doubt that there was an accident and Mr. King suffered an injury as a result of that accident. Mr. Testa went over the defendant's view of what the injuries and damages were and I am sure you will hear some rebuttal on that from Mr. Sergi. I won't dwell on it myself. I think the most accurate measure of what actually happened to Mr. King is contained in the hospital records.

You heard from Dr. Smith. Dr. Smith is a paid expert, pure and simple. He didn't treat Mr. King. He gave him no medical advice at all. He was aware Mr. King had a prior injury to that same left knee, but he wasn't interested in seeing the records of that at all and as to the records of this accident, I think it became rather apparent that he hadn't even seen all the records of Dr. Tagliagambe, the treating and operating physician, only such records as the attorney provided him with.

In his closing remarks and in his opening remarks Mr. Testa referred to three trials, so for convenience I will refer to those three trials, too.

I have discussed with you thus far only trial number one in which I firmly believe that there has been a failure of proof on the part of the plaintiff to show any unseaworthiness condition for this vessel. Furthermore I believe the testimony has shown that Mr. King was substantially, if not completely responsible for his own accident.

Trial number two concerns the shipowner as against the stevedore. I don't think there is any reason at all to dwell at length on the allegations there. We claim that if in fact you members of the jury find in favor of the plaintiff on trial number one, then I think it follows as day follows the night that the shipowner may look to the stevedore company for reimbursement because the stevedore company in fact created whatever condition existed in that hatch and of which Mr. King now complains.

The issue on trial number three is somewhat different. That is as against the shipowner as against the employer, Court Carpentry. Now, Court Carpentry is also an independent contractor with its own supervisory personnel and its own workers, such as Mr. King. Mr. Auletti was the supervisor for Court Carpentry and he was responsible for checking the hatch to see if it was a suitable place for his men to work. Mr. Auletti

said he looked and he saw nothing.

Now, if there was a dangerous condition such as Mr. King described on his deposition, a space between beams in this walking area, then certainly Mr. Auletti would have seen it, or should have seen it. I believe Mr. Auletti admitted that following the incident he looked in the hatch from another position and sure enough saw this alleged unseaworthy space between two of the beams. So if he saw it one time, perhaps he should have seen it before he sent his men down.

Again, in our claim against the employer, Court Carpentry, I suggest that you consider Mr. Auletti's further testimony that a full hour passed between the time Mr. King and his partner, Mr. Perry, went down into the number 4 shelter deck. If there are dangerous conditions down there -- Mr. King testified that it's his job to report to his supervisor any dangerous conditions or any complaints that he has about working conditions. Mr. King made no such complaint and he can't walk around in a hatch like that with blinders on and say, "Well, I just didn't see it. I have no duties in that respect."

The third aspect of the claim against the employer, Court Carpentry, is our claim of plaintiff's

contributory negligence. Please bear in mind that Mr. King was at all times an employee of Court Carpentry and that if he in fact was contributorily negligent leading to his own accident, then that negligence is the negligence of his own employer, at least we so contend it must be attributed to his employer on the claim for indemnity. That may explain in some way Mr. Testa's reaction to the charge of contributory negligence when he said that he didn't think that the plaintiff was contributorily negligent. He didn't want such negligence attributed to hisown client, and understandably so.

In sum, then, on case number one it's our position and always has been that there has been a failure of proof on the part of the plaintiff to show that this vessel, the Trautenfels, was unseaworthy.

On claim number two it has been our position that we would be entitled to indemnity reimbursed by the party that created this condition and also that Court Carpentry failed in its duties toward the vessel-owner as I previously reviewed with you. This doesn't mean that we are looking to get itall back from both. This would mean that if you people should find in the first instance that Mr. King is entitled to recovery, then we would look to them jointly for

reimbursement for whatever we had to pay Mr. King.

That about concludes my remarks. Again I thank you for your attention. Mr. Sergi goes last and please bear this in mind: We on the defense have tried to touch on what we think are the important things that have come up during the course of the trial. If Mr. Sergi should say something in the course of his closing remarks that you would say, "Hey, how about that, defense?" We can't come back and we are not allowed to under our system. He goes last and that's his privilege.

Thank you very much.

THE COURT: Thank you, Mr. Molanphy.

Mr. Sergi, are you ready to proceed?

MR. SERGI: Yes.

If it please the Court, counsel, madam forelady and ladies and gentlemen:

After having heard three summations I am very happy they are at least split up because by the time I got to speak to you you probably heard a great deal about this case and you probably already believe that you heard it all. Well, that's not necessarily so, so the reason that I am the last speaker is because I am the only one who is here representing Mr. King and urging his position.

My adversaries, as you see, are three in

number, not one, so all three of them have spoken to you and after Mr. Molanphy's last comments, I don't know how they could have left anything out. All three had their opportunities and they certainly covered every area of defense that I could possibly imagine they could think of.

I came in here and addressed you first and I told you that I was going to prove certain facts and I told you that I would come back, as I am now, and remind you of the facts which I told you I was going to prove.

Now, obviously the proof is so overwhelming about Mr. King's accident that it has been finally conceded by all counsel that the accident took place. It wasn't conceded before we started, so I was put to my proof, but now as you heard Mr. Molanphy, he has just stated, obviously Mr. King stepped into a space between two beams, and he is not being gracious about it or just giving it away, he just has no defense to the facts that Mr. King did step into the space.

I suppose you have been wondering, and rightfully so, what kind of a matter is this. Why is it that I bring an action on behalf of Mr. King against the shipowner when obviously whoever stowed the cargo or

placed the beams down that hold was the stevedore. So if the stevedores didn't do their job properly, why am I seeking compensation from the shipowner? I think it should be explained to you the reason for that, and we mentioned it in opening and it's been bandied about, the word of warranty of seaworthiness.

At this moment it may not mean very much to you, but it will as we go along. You see, it's the vessel-owner and no one else that owes this duty to Mr. King as a maritime worker. The stevedore does not owe the duty nor does the employer owe the duty. It's the shipowner and the shipowner alone who owes the duty to provide Mr. King with a reasonably safe place to work. So no matter how it's created, whether somebody else creates the situation, if the condition is an unreasonable one and if the area is not reasonably safe, then it's the shipowner who stands in responsibility, but obviously as you have heard, if he does stand in responsibility he is not hurting because whoever created the condition, such as the stevedore, will indemnify him for everything so he becomes a conduit for payment or compensation to Mr. King if you find in his favor.

So to sit there and think perhaps, why pick on the shipowner here, he has done nothing, well, the law

provides a responsibility and places the responsibility upon the shipowner for possibly the wrongdoing or the wrong stowing or improper stowing by a stevedore or anyone else.

So the law in its wisdom has arranged this situation whereas if the shipowner must pay because he breached that warranty, that representation to Mr. King, he is not going to be hurt because the shipowner then will be compensated and indemnified by the other parties or whomever created this situation or was responsible for creating it.

I hope you understand what the relationship is and now you probably understand why each gentleman who rose and spoke to you representing their own respective clients argued against Mr. King's position because if there is no responsibility on behalf of the shipowner, why, of course, they all walk out of here feeling very good and nobody pays anything to Mr. King, so they have done a very good job for their respective clients.

However, I am hopeful that that is not going to happen because you are going to find that there was some responsibility here on behalf of this shipowner and that the shipowner does owe to Mr. King

for the devastating injury that he suffered to his leg and keeping in mind that if you do find that way that you also know that the responsibility of the financial burden will lie upon the one who created it, because you are going to have to make that determination also.

So here we are and as I understand it now because the accident has been conceded, I must somehow try to convince you about the responsibility of the shipowner and the condition that was there. Well, the warranty of seaworthiness that has been set forth many times indicates that the responsibility of the shipowner is to provide an area that is reasonably safe for these men to work. This has not come about by pure accident, but by the wisdom of our forebearers, our predecessors and those who decide these things and they decided because the work of these men aboard a vessel is an extremely dangerous one, as has been told to you and described to you by Mr. Molanphy and others, because the work is that dangerous and there are hazards there, an additional imposition of responsibility is placed upon this shipowner to make sure that there are no conditions that are more hazardous than ordinarily expected and what I argue to you is a space in cargo that cannot be seen, where a person working down there steps into is a dangerous

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condition and not a reasonably safe place for a man to work. It's as simple as that.

It's your determination that is going to decide whether those conditions down there were reasonably safe.

Now, you can't think about that in the abstract. You know, you have got to take all of the conditions that were involved at the time of this accident. It's a little difficult to bring your minds back to a situation that happened way back in 1968 because, after all, all we have here is a verbal picture that was described to you by only one person, really only one person, and that was Mr. King. So the accident happened in 1968 and he is now in 1974 called upon to describe for you every particular incident that occurred down in that hatch.

I find myself being hard-pressed to try to remember each and every incident that happened in 1968. However, Mr. Molanphy attempts to point out what he, Mr. Molanphy, feels is the discrepancy. The discrepancy is not in the fact that Mr. King did or did not step into the space. No. There is no discrepancy as to that. There is no proof required any more because they conceded it.

Now, where does this descrepancy lie? He says, "Well, if Mr. King is walking down the aisle that was left for him to walk and if he had stepped into a space there, then we are not responsible, or if we are responsible, why, then, it's all Mr. King's fault. Why should he step into a space?"

Well, what comes to my mind, and I hear what you hear and nobody has said it yet, but I want to tell you this: It's your recollection of the testimony that controls, not mine, not any counsel. It's your recollection and yours alone and if there is any doubt in any juror's mind as to what the testimony was and you don't remember it all, you have a right to inquire of the reporter to read to you the testimony of any of these witnesses. So what I am telling you, of course, is what I remember. Is it any surprise that I would be remembering what I want to remember and they would remember what they want to remember?

Therefore, it's upto you to remember all of it not impartially and not just favorably to one side or another. But I remember Mr. King saying, "Do you think I would step into that and kill myself if I saw it there?" I remember him saying that and that's pretty good common sense. After all, we are asking everyone here, especially

you people, to exercise your good common sense and your experience. The man said it many times. "Do you think I would step in there and kill myself or break my leg or hurt myself?"

Now, he said it many times and I heard it. I don't think anyone would step into a space if he knew the space was there and hurt himself intentionally and destroy the rest of his working life. He sits here and he is still suffering pain from would you want to call it as they do, a stupid move to step into a space that he saw? It's incredible that they pose that position to you.

One counsel spoke to you before I got to speak to you. The very first attorney, Mr. Testa, said there is no contributory negligence here. So they agree there is no contributory negligence. If the man cannot see a situation, he can't be charged with having seen it. I suggested before that you have got to take this in the proper context. If I am standing here and walking along, and there is no reason for a space, but I walk along and I take a quick glance and I walk and there is nothing to interfere with my seeing spaces if there are any, but try, if you will, picturing what it was like down in that hatch or that room where Mr. King had to work

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with his co-worker. Steel beam floors. Spaces. I will read to you about spaces, and it's in evidence. Great big booms all over this place, some over his head. A dangerous place to work? Why, of course.

And he had to carry his equipment, coils of cable over his arm, he testified to, and clips and whatever and now he has got to walk along there and do his work.

Now, I don't know that any reasonable person would expect him to walk along head down between his legs and examine every area where he is walking. He is going to do what every ordinary person would do, take a quick look and walk along and try to do his job as quickly and as well as he could.

Let me read to you about spaces. Mr. Molanphy says there were discrepancies in the testimony of Mr. King. All right, I read from page 22, which is in evidence, by the way, offered by Mr. Molanphy.

Line 18:

"Q Were these I-beams?

"A What I was going to lash was the stuff I am telling you that is stored on top of the steel beams."

So he was not there to tie the steel beams as they would lead you to believe, he was there to tie the other items, the booms that were lying on top of the steel

booms and in order to do that he had to get to the end of these cranes, these booms that were lying there, go around behind them and tie them to the skin or the wall of the ship as Mr. Auletti indicated. That's why he made his right turn, to go around the boom.

"A I am telling you that it's stored on top of these steel booms, you know, that is flat on top and they drop that stuff which is done on there. We was going to pull it to the wing to lash it."

Pull it to the wing to lash it. Pull what? Pull the boom, not the beams as they would mislead you.

"Q Were these beams at the time you went into the shelter deck, were the beams completely covered by the structural booms or these booms that are used in construction work?

"A Well, they were spaced about like this for me to walk down between."

That's the aisle we are talking about.

"Q Was the flat part of each beam stowed right up against the flat part of the beam next to it?

"A No, it wasn't."

There it is. He is walking down the aisle and the beams, they are not next to each other.

Now, he was asked whether he saw the space into

which he fell before the accident. He was asked that and I want you to remember now this was back in 1968 he was asked the first time and then he was asked again in 1973 and he now was asked again in 1974.

"Q How wide a space was there, Mr. King?

"A Well, the space after I fell in.

"Q You didn't notice whether there was a space there or not?

"A No. Till after I fell in it I didn't.

"Q And up until the time that your foot went in you hadn't noticed this space between the beams?

"A No, I hadn't."

Now, how can you charge a man with a responsibility of stepping into a space you don't know was there? It's unreasonable to even believe it. If you want to talk about spaces, I will talk about spaces.

Mr. Pinto, the hatch boss, his testimony was taken by the attorney for Mr. King, and if any explanation was required about Mr. Pinto he could have been brought in here by anyone but you didn't hear anybody except Mr. King testify and Mr. Auletti. Maybe he would have answered some questions that there were some discrepancies. But he is not here.

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Now, he talks about spaces, and he is no friend of Mr. King. He didn't even know him. Page 11:

"Q Now, you didn't inspect or did you inspect the beams after they were placed down to see how close together these beams were after you placed them?

"A Did I inspect them?

"Q Yes.

"A The only thing I know was I put them down there and I tried to get them as close as possible.

"Q But there could have been spaces between these beams?

"A Maybe there could have or maybe there couldn't have."

That is a very significant answer and I want to bring your attention now to come other testimony you heard from Mr. Auletti who said, and I remember it clearly, "These longshoremen today, they don't work any more. You can put them together, but they don't do it any more."

Here it is, they just don't care. They do their work and they get out. They don't care about the next fellow. The answer is right here.

Reminding you of Mr. Auletti's testimony -- I noticed it in his direct testimony when I asked him about it.

"The stevedores cover them with dunnage like a flooring."

Now, we are talking about the dunnage and if you remember he said it was like the railing over here. The top of the railing. The top. It is a board, one like this, 1X6s, you put them down and you make a floor and you leave no spaces.

Now, that's the way you do it if you can't put it together. That would be reasonable if you expect people to work there after you placed cargo down there that has spaces. That would make it a reasonably safe place to work. Absent that, this area is not reasonably safe and that's what this is all about.

I don't think I will continue belaboring this point. I think I have driven it home. I think I have explained it. I hope I have explained it. I hope I have made you understand why it is we bring our action against the shipowner and what a reasonably safe place to work is. It's our contention, and I am sure -- I feel sure that I have proved that the area where Mr. King stepped was not a reasonably safe place and I think I have proved in my argument and with reading of testimony that Mr. King did not contribute to this happening at all. At all. He did his work like any

ordinary prudent man and to demand more of him is to demand perfection, which is not expected of us. He is no different than any other person.

Well, now, if you believe, as I certainly think you will, that the shipowner here is responsible for not giving Mr. King a reasonably safe place to work, we must now decide -- that is you must now decide because the burden shifts to you -- what happened to Mr. King' as a result of this indiscretion, this carelessness by whomever placed it there rendering the vessel unseaworthy. Comment has been made that Dr. Smith was brought here and Dr. Smith testified and he is a paid expert. You know, I could have just given you the hospital record for you to read but I don't think it would have been very acceptable and I don't think you would have understood it very well because I don't understand it very well, so we have a doctor, a qualified doctor who gave you his qualifications. He is a diplomate. He is a highly qualified fellow. Nobody attacked his qualifications. To have a doctor examined so he could tell you better what the injuries were is certainly nothing that I must be ashamed of nor Mr. King because the others here had doctors who also looked at Mr. King. Not necessarily for treatment, but they were not brought in to tell you that

the injuries that Mr. King has are not so. They had an opportunity to bring their doctors in and reject the position that Dr. Smith gave you; to reject the description of the injuries; to reject the finding of permanency.

But they don't bring in any witness. They try to get up here and argue to you with rhetoric and try to convince you that Dr. Smith is a paid expert. Of course he is a paid expert. Who works for nothing? Being an expert is certainly not offensive. That's his profession. I am an expert in my profession, I hope. What's wrong with that? He sat there and he told you exactly what was wrong with Mr. King. The treating doctor, Tagliagambe, made the first diagnosis. Then Dr. Smith referred to it. Right directly from the place where the accident happened Mr. King was taken to Dr. Tagliagambe's office and the doctor there, not Dr. Smith, Dr. Tagliagambe, who is the treating doctor, says, "Contusion sprain and abrasion of the left knee and internal derangement of the knee."

Okay? Now, that statement alone I don't think explains very much, so we needed an expert, a medical expert, and he was here and he told you that is a statement made by a doctor when he feels there is

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something wrong inside the knee and that's what was said. He examined him, he made certain findings and he told them to you. There was no one here to contradict the findings made by Dr. Smith nor to reject his testimony. It's uncontradicted. He examined him three or four times and he is the doctor -- Dr. Smith is the doctor that as a result of his examining Mr. King the third time or the second time, rather, he is the one who recommended the operation.

Was he mistaken? Well, the operation was performed by Dr. Tagliagambe so obviously Dr. Smith was not wrong. When you say did Dr. Tagliagambe do a good job, well, let me see. Does anyone say that he didn't do a good job? He did a good job under the circumstances. He removed part of the knee. That wasn't a bad job, he had to remove a part of the kneecap. It was damaged. He excised the medial meniscus and Dr. Smith, it was absolutely necessary for him to be here and tell you what that is and he told you that it was removed, no question about it.

The operational chart in the hospital record right here -- and by the way, this was not under general anesthesia so Mr. King knew what was going on all the time. They punctured his lumbar and anesthetized

part of his leg. He was lying there and realizing that his leg was being cut open and his kneecap was being operated on. Both layers of the capsule and synovium were then excised. Excised, which means cut and removed and then the medial meniscus was excised by sharp dissection and removed. As you heard from Dr. Smith, removed for all time, never to be replaced. A permanently damaged knee.

When the argument was made by counsel as to, "Well, what kind of a damage is this? Football players, basketball players, they get this all the time."

It's incredible that the argument is presented to you. Well-trained athletes, basketball players, football players, well-trained, strong, young men suffer this kind of an injury and have an operation. I suppose the most famous of all these is Joe Namath who plays football. We watch football and we know that. But you know what happens? Here are men who can hear -- some have earned as high as a million dollars and yet because of this type of injury their playing life is shortened 25 years, 30 years, and they must quit. Now, if this is such a frivolous injury, why must they quit? Do you want to compare a Joe Namath or other healthy, strong athleteswith this man, a 60-year old man, and say that he should have

bounced back and have recovered like an atlethe bounces back and recovers, young men? I think the argument is fallacious and I think it's an incredible one to even submit to you. The fact remains that Dr. Tagliagambe, the treating doctor mind you, treated Mr. King from 1968 -- through '68, '69 and '70 and operated on him and saw him after the operation and compelled him to use crutches; he compelled him to use a cane; he compelled him to wear a cage around his knee with steel bars and canvas. All of that, and certainly all of that was not attempted just for the sake of exercise. It was attempted in order to remedy a very bad situation because doctors don't waste their time uselessly, in futility, but here they attempted, both Dr. Tagliagambe and others attempted to reconstruct and rebuild and give back Mr. King his leg so he could use it.

You know what? They couldn't do it. They couldn't do it, because he still has the same problem. As Dr. Smith told you, he is going to continue having it for the rest of his life. He still has the pain. He still can't stand too long, as a result of which he can't do any work either. That's something else again. I am a little embarrassed by someone standing here and telling you that in 1965 everyone must stop working.

I look forward to the day when I will be 65 and I hope I don't have to stop working. In this day and age people live a lot longer than they used to live. I know many senior citizens, so-called -- I don't know why they have been labeled that, but anyway so-called who are awfully unhappy because they have been discarded from the labor market and the only reason they are discarded from the labor market is because they are 65 and they are just as productive as they were at 55 and just as productive as they were at 50 and it seems a shame to destroy all of that productivity just because someone gets to be 65.

Now, let's talk about this man here. He is now 66 and he said to you from that witness stand, "If not for my leg I could continue working today and I would be."

Because if not for his leg -- the man can still swing his arm, still move his back and still perform a good day's work. Dr. Smith says if it wasn't for his leg at least he could stand up and do carpentry work without going on a ship, but obviously he can't do it on a ship any more. He can't go up and down ladders. Can he swing his arms? He can't stand up. He has been totally deprived -- totally deprived of any productive work.

He has been totally deprived of any income. If anyone feels that a man's dignity is not affected because he can no longer be productive unto himself and to his family, I think you are just not thinking of the situation as it should be thought of. The man's dignity is affected when he loses his ability to support his family and a man would like to work until he can't work any more. Not because somebody destroyed him, but if the Lord above says, "That's as long as you are going to work or that's when you stop working," I think that's the only time you should stop working, not because someone says you are 65.

So I am telling you all these things because if you find in favor of Mr. King, because I know you will, he has got to be compensated for all of the money he has lost as a result of not having been able to work because of this injury. Now, we know the accident happened in 1968 and we know that he had been earning monies before that. We have his earning records which I put into evidence so you can take them with you, figure it out, work it out, add it up, whatever. Well, I have tried to add it up and in 1967 he earned approximately $8,000, give or take five or ten dollars. In 1968 when he had this accident in June he stopped working and then he attempted to go back to work for a couple of days in September and you notice

nobody is calling him a faker. He tried. He tried and he tried and he tried and that man's dignity pushes him on to work despite of the pain and the crippling effect to the leg. So he tried. So in 1968 from the year in which he was hurt he earned $4,300, but not having earned the $8,000, so he lost $3,700. In 1969 he earned $5000. He didn't reach the $8,000 goal.

He would have had it were it not for the injury so he lost $3,000. In 1970, the year of the operation, he didn't work at all. He had no earnings at all. So he lost $8,000 there. In 1971 he earned $5,000, $5,200, but he didn't reach his goal of $8,000 which he would have and that's $2,800 he didn't earn.

In 1972 he earned only $736. A man's courage can go only so far and no more and he just couldn't do it. In spite of the fact that he wanted to, in spite of the fact that he pushed himself, in spite of the fact that he was working with pain at all times, he finally had to quit and he earned only $736, therefore, losing $7,200.

Now, he is not 65 yet, as someone would have you feel is the cut-off date because he is only 64. In 1973 he was 65. In 1973 he didn't work at all. That's $8,000 he lost. Up to that day, 1965, the year which they suggest you cut off the earnings, he has already lost

$32,700 if not for this injury he would have earned.

Now, I say to you and I say it without any embarrassment, this man would have worked and would have worked more. There are tables that are calculated by the United States Department of Labor and they try to reach averages and norms and expectations about a man's work expectancy and life expectancy. I have looked at that table and the table says a man 66 years of age --

MR. TESTA: If your Honor please, there is no testimony in this case with respect to tables.

MR. SERGI: Your Honor is going to charge that, I think.

THE COURT: Yes, proceed.

MR. SERGI: A man's work expectancy at age 66, if you will, is still five years, according to that table. It's not something he just volunteered. According to that table compiled by the U.S. Department of Labor -- it gives this man another five years of work after 66 and if not for the injury Mr. King says he would have worked.

Now, five times $8,000 is $40,000. He has lost $74,000. Now, that sounds like a lot of money, but think about it a little bit. If you suddenly stopped working and you began to look into your future and you tried to determine, "How much money will I earn at the end of

20 years," you will get a really large amount, but you are not doing it that way. You are earning "X" amount of dollars per year and "X" amount of dollars per year and you are not adding it to. But Mr. King didn't earn it per year, he would have earned it. He has been deprived of earning $74,000.

If you find for Mr. King, he is entitled to have it back. Every penny of it. You are going to be asked, if you decide on the sum of money that Mr. King would have earned in the future -- you are going to be asked to discount it, understandably so, which means what's the present value today of what he would have gotten in the future, so you discount it back and you reduce it. But when you are asked to do that I just want you to remember also we are living in times of terrible inflation. So if you discount it back please keep in mind that with our inflation it will be higher. In addition to that it was agreed and stipulated by all counsel that as a result of this injury medical expenses were incurred in the sum of $1,605. That was stipulated to. He is entitled to that. $1,600 and $74,000 is $90,000. It sounds like a lot of money, but, please, put it in proper prospective and think about it as I have suggested to you. You know, the damage is not over yet. It's not

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over yet. Because the law asks you to make a further determination, because Mr. King is not entitled to anything less than you and your loved ones were entitled to if you were to come into this courtroom and bring a similar type of action. He is entitled to be compensated for pain and for suffering. That is a terrible burden to have to place on you because there is no measuring device, and I can't submit to you, but each of you must in your own good conscience and good common sense make a determination whether Mr. King did suffer any pain; whether he still suffers pain and whether he will suffer pain for the rest of his life.

Now, is there any question in anybody's mind that he suffered pain from 1968 until 1970? If he hadn't suffered pain there was no reason or need for the operation, so obviously he did suffer pain through 1970. And certainly the operation wasn't a pleasant experience, being in the hospital and being given medication for pain as was described and read from the hospital record that Mr. King was given various medications for pain. Certainly he had pain there. After he left the hospital he was still under the care of a doctor and the doctor wouldn't take care of him unless he had some pain. So he continued to have pain through 1970 without

any question. There shouldn't be any doubt about that. But now he tells you that he still has pain. Dr. Smith -- I asked him a couple of times and he says that the conditic is a permanent one, which means forever, for the remainder of Mr. King's life.

Now, what does that mean? How long is he going to live; how long is anyone going to live? So, too, these tables indicate how long we expect someone to live. His expectation is 12 years. If the Lord wants he can live more than that. If you want to talk about life expectancy, if longevity is inherited -- I want to read something to you. In this hospital record it crossed my mind as I read it as being something fantastic. You have got to live how long Mr. King is going to live and if longevity is inherited, it says here, "Family History Father's age at death: 88 years old." So who are we to say he is going to live 12 years. But what I submit to you and if you want to accept the 12 years, you have got to decide that during those 12 years he is going to continue suffering the pain. Of course it's not as bad as it was in '68 or '69 or '70, but the fact remains he still cannot stand on it too long; he still cannot work; he still has some pain. I pass it to you. I hope that I have fulfilled my responsibility. I feel a

little better that the yoke of responsibility of presenting Mr. King's claim to you has now passed to you. I hope that I have done what I have supposed to do and I know that you are going to do what you promised to do when you took the oath as jurors here. If you do exactly that, Mr. King will never complain. Mr. King is a simple man who comes into this courtroom and asks only justice, impartiality, without prejudice and without bias and I don't think that anyone in this country can ask any more or any less and the responsibility for the administration of that is on your shoulders.

I am glad I have relieved myself of the responsibility. I want to close by telling you that Mr. King has asked me to thank you for coming here and listening to his claim and knowing that you will make an appropriate and just determination and give him full justice without compromising anything at all; no compromising on the damages and no compromising on the justice. That's what he expects and that is what he is entitled to and that is what he thanks you for.

THE COURT: Thank you, Mr. Sergi. At this time we will take a recess The jury is excused.

(Jury not present.)

THE COURT: Mr. Sergi, during the course of you

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closing remarks to the jury you referred to the medical expense of $1,600, I believe, as an item which Mr. King is entitled to recover if the jury finds that he is entitled to an award.

Now, you will recall that I had prepared yesterday proposed interrogatories to the jury and that item I don't believe was on there. Do you recall that?

MR. SERGI: Quite frankly, I don't.

THE COURT: Well, my law clerk is about to bring those down so we can look at that again.

Mr. Testa, I have also revised the interrogatories to the jurors in accordance with your suggestion, that it be phrased as the plaintiff's question is phrased, has the vessel-owner sustained its burden of proving that Court Carpentry breached its implied warranty of workman-like performance and if the answer is yes, was that breach a proximate cause of the plaintiff's injury and it has been so framed with respect to the stevedore.

MR. TESTA: Thank you, your Honor.

THE COURT: So that revision will be brought down.

MR. TESTA: At this time, your Honor, may I

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call your attention to the case of Kungham against Rederiet Vindeggen, 333 F. Second 208, a 1964 decision of the Court of Appeals of this circuit, your Honor, wherein the Court has held that the work expectancy of a longshoreman and a harbor worker is to age 65. I ask your Honor to so charge in view of Mr. Sergi's statement to the jury that it's beyond age 65 and that this man has a five-year work expectancy.

THE COURT: All right.

MR. SERGI: Your Honor, I thought you ruled on that yesterday and you were going to charge what you felt was the life expectancy and the work expectancy according to the table that was used in the last trial and certainly the same table that has been used in many trials in this Court.

THE COURT: Mr. Testa has a second circuit case that says that the life expectancy of a longshoreman --

MR. TESTA: Work expectancy.

THE COURT: Work expectancy. I am sorry, that's only a guide.

MR. TESTA: The reason I mention it is I don't believe the Court was asked to take judicial notice of any tables with respect to work or life expectancy and counsel has already stated to the jury what it is

according to these tables.

MR. SERGI: I guess I took little liberties knowing that your Honor charges life expectancy and work expectancy as you had in the last trial of this case and I make reference to the same chart that your Honor has used and, therefore, I have also submitted it in my request to charge and since we didn't go over every one of the requests to charge individually and we accepted your Honor's statement about the manner in which you are going to charge, I didn't have to make any point of doing that, knowing that the Court was going to charge it in anyway.

THE COURT: What's the card that you have there?

Yes, as Mr. Sergi points out, the Court is required to charge the jury, as you know, with respect to any award of future lost wages or future pain and suffering, because any such award has to be discounted to its present value and the second circuit has ruled, Mr. Festa, that the Court has to do that whether counsel requests it or not.

Now, in making an award for future pain and suffering, that obviously must take into consideration the plaintiff's life expectancy. In making an award for

future lost wages, that must obviously take into account the plaintiff's life -- working life expectancy or work life expectancy.

Now, as we said, there are tables published by the government which indicate possible work life expectancy I think those are published by the Labor Department. As you say, the second circuit has ruled that in the case of longshoremen or persons doing similar work, such as the plaintiff here, I gather, the life expectancy of a longshoreman did you say --

MR. TESTA: The work expectancy is age 65.

THE COURT: Now, the plaintiff, I don't know that he is a longshoreman.

MR. SERGI: The plaintiff is not a longshoreman and does not do the same work that a longshoreman does and therefore I object to that case being used. This man was not a longshoreman. He is a marine carpenter. There is a vast difference between a longshoreman and a marine carpenter. A longshoreman actually uses his brawn for moving about heavy cargo. Mr. King does not do that. He merely ties up chains and secures chains and nails down boards.

Now, that's an entirely different kind of work and I think it terribly unfair to impose upon him that

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decision that Mr. Testa has handed you which refers to longshoremen only, because that's all it says, longshoremen, unless it refers to others in the same decision.

MR. TESTA: If your Honor please, that decision refers to longshoremen and harbor workers.

MR. SERGI: Where does it say that? Let me see the decision.

THE COURT: During the recess we can look at it

MR. TESTA: Mr. King falls within that category, your Honor.

THE COURT: We will look at the case and if it covers persons other than longshoremen -- if it covers harbor workers, I would think that Mr. King falls into that category since he is a marine carpenter and he described his work as tying up heavy equipment aboard ship.

All right, as indicated, Mr. Testa, this proposed interrogatory to the jurors does not contain that reference to the medical expenses. So that would have to be added.

We could possibly add that to the top of the second page and re-number accordingly so we don't have to re-do the entire thing. So we will insert at the top of page 2 item 3, medical expenses, is that it?

From the date of the accident to the present?

Is there any claim for future medical expenses?

MR. SERGI: No, your Honor.

THE COURT: All right, medical expenses from the date of the accident to the present.

Now I will pass you the revised interrogatory relating to the claims offer.

With respect to this revision on top of page 2, I notice that there is omitted a yes or no which will be inserted. I guess in copying it was left out. So the top of page 2, in answer to the second question, yes or no was omitted, so we will insert that.

MR. TESTA: If your Honor please, just so the record may be straight, I did not request that the interrogatories be submitted to the jury. The way I requested they be submitted was that, has the vessel-owner established its claim that Court Carpentry breached its warranty of workman-like performance of the marine lashing operation and that this breach or warranty was the proximate cause of plaintiff's accident. I did not suggest any such language about failing to notice, remedy or cause to be remedied a dangerous condition because the testimony in this case is that these beams were so heavy that Court Carpentry could not have remedied these

conditions. They could not have done anything about it other than to chock them, which means putting a board between them. That does not eliminate the space, your Honor. This was not my suggestion at all.

THE COURT: At least the record is clear. Is there anything else?

MR. MOLANPHY: Your Honor, may I ask how your Honor intends to handle the question of contributory negligence?

THE COURT: I think we have been over that at least five times in this case. We are not going over that again, gentlemen.

MR. TESTA: For the record, your Honor, may I have an exception to these two interrogatories which your Honor proposes to submit to the jury?

THE COURT: Yes.

MR. TESTA: And also may the record show that I asked your Honor to submit an interrogatory with respect to conduct precluding indemnity on the part of the shipowner. I would like an exception to your Honor's refusal to submit such an interrogatory to the jury.

THE COURT: Let's see, what was that again?

MR. TESTA: I say your Honor will recall that

I asked your Honor to submit an interrogatory to the jury with respect to conduct on the part of the shipowner precluding indemnity. That is, I requested an interrogatory to read, "Did any conduct of the shipowner prevent the shipowner from recovering indemnity from Court Carpentry?"

THE COURT: Yes, we have been over that. I had pointed out that I had previously written a memorandum opinion in which I ruled that the ship did not have a duty to inspect the work of the stevedore. So on that basis your request now is denied. We went over that yesterday and I ruled the same yesterday.

MR. TESTA: I just want an exception on the record today, your Honor.

Would you return to the clerk, please, your copy, so that we can make those minor corrections we noted.

MR. HOCKETT: If the Court please, we have inked them in on several over the copies, at least I did.

THE COURT: All right, you can keep your own copy. I will just do that on the original.

MR. HOCKETT: Did we have the Court's permission to go outside?

THE COURT: Yes, we are going to take a brief

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recess in this case.

(Recess.)

* * *

(In open court, jury not present.)

THE COURT: All right, Mr. Testa, did you get that case?

MR. TESTA: I gave it to the clerk right here and he said he gave it to you.

If your Honor please, while he is getting that case, I just noticed that in these interrogatories in the third-party action you refer to my client by name but you refer to ITO as the stevedore. I would respectfully ask your Honor to insert that name ITO in that interrogatory so there would be no confusion in the jury's mind as to who they are dealing with.

THE COURT: Let me say that if they don't know that we are talking about the person that loaded the steel beams on the boat, Mr. Testa, we are in sad shape.

MR. TESTA: That's true, your Honor, but the name --

THE COURT: What difference does it make what the name is? You know it doesn't make any difference and we don't have time for petty things like that

Would you please sit down if that's all you have to say.

MR. TESTA: That is my request, your Honor.

THE COURT: Now, Mr. Sergi, with respect to the life expectancy of the plaintiff according to this chart that you have handed up it's 12.6, is that right?

MR. SERGI: Yes, your Honor.

THECOURT: And the work life expectancy is 5.9?

MR. SERGI: Yes.

THE COURT: Where do you say in this case it refers to --

MR. TESTA: Right where their marker is, your Honor. There is a statement by the Second Circuit that the work expectancy of a longshoreman is age 65.

THE COURT: We were talking about whether it covered persons other than longshoremen, whether all harbor workers --

MR. TESTA: I think it's fair to interpret that designation to cover all harbor workers, your Honor, and not just restrict it to longshoremen.

MR. SERGI: I don't think how it could --

THE COURT: Just a minute. We are not

calling for any jumping up. I mean, you have to realize, Mr. Sergi, that this reporter is having a difficult time in any case in which we have four lawyers, all of whom feel free to address the Court at any point at any time on any matter.

MR. SERGI: I apologize for that, your Honor. I will not do it again.

THE COURT: This record is going to be completely destroyed.

All right, would you bring in the jury.

(Jury present.)

CHARGE OF THE COURT:

THE COURT: Ladies and gentlemen, first I want to thank you for your patience and for your cooperation in being prompt. I know that this has been a relatively short trial and I want to thank you for the careful attention which you paid to the testimony and other evidence as it came in and to the careful attention which you paid to each of the lawyers as he made his respective summation. I trust that you will bear with me now and give me that same degree of attention which you have given throughout the trial so that you may carefully understand the legal principles which you are to apply to the facts in this case as you find them.

Now, as the lawyers have already indicated to you in their remarks and as the testimony indicates, there are three claims being tried together here. The first is the claim of the plaintiff, Jackson O. King, against the vessel, the vessel owner, the owner of that vessel, claiming damages on the ground that he was injured while working on board that vessel as a result of an unseaworthy condition on the vessel.

As I told you earlier, having brought that claim against the vessel owner, the vessel owner in turn brought an action against the stevedoring company which loaded the steel beams onto that vessel and in addition brought an

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action against the plaintiff's employer, claiming that each of those independent contractors breached their implied warranty of workmanlike performance and if the plaintiff recovers against the ship or the ship owner because of this unseaworthy condition, the ship owner is entitled to reimbursement from the stevedoring company and the plaintiff's employer because as the vessel owner claims, those independent contractors breached their duty of workmanlike performance to it.

Now, in submitting the case to you I am going to first sumit to you the plaintiff's case against the vessel. In doing so I am going to submit to you what we call special interrogatories to the jury; that is questions which we want you to answer so that we will know the basis upon which you arrived at your decision regarding the plaintiff's case against the vessel. Then when that has been completed I am going to submit to you a separate and distinct set of interrogatories relating to the vessel owner's claim over against the stevedoring company and the carpentry company and you will answer the questions with respect to that claim on those sheets of paper.

As I have said, this is an action brought by the plaintiff, Jackson O. King, against the defendant, and we have been referring to the defendant here as the Hansa Lines

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for short. It has a long German name, but to simplify matters we have been referring to the vessel owner as the Hansa Lines. So when I say Hansa Lines I am referring to the vessel or the vessel owner.

As I have said, the plaintiff has brought this action against the owner of the vessel in which the plaintiff was assigned to work by his employer, Court Carpentry, on June 18, 1968.

The plaintiff claims that while he was working aboard the vessel he sustained a permanent injury to his left knee when he accidently stepped into a space between two beams. These beams had been layed on the floor or the deck as they call it of the No.4 hatch by a stevedoring company employed by Hansa Lines to load the H-beams and other cargo on board the vessel.

It was the plaintiff's job to lash or secure this other cargo to the H-beams with a heavy wire. It is undisputed that the plaintiff was required to walk on the H-beams to accomplish this task.

The plaintiff claims that the leaving of a space between the H-beams on which he was required to walk created an unseaworthy condition on board the vessel for which the vessel is liable to him for any injury and monetary losses which he has sustained as a result of this unseaworthy

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condition.

First I want to point out that the mere fact that a plaintiff in a civil action makes certain claims does not mean in and of itself that the plaintiff is entitled to some award of damages and that is because the law requires that before a plaintiff in a civil action can recover any money from a defendant, the jury must first be persuaded that the plaintiff has proved his claims by a fair preponderance of the credible evidence. Therefore, I would like to call your attention to the plaintiff's burden of proof in this case.

If you ever served on a criminal jury before, then you will know that the burden of proof in a criminal case is different from the burden of proof in a civil case. In a criminal case the Government has the burden of proving that a defendant is guilty of the crime charged beyond a reasonable doubt.

In a civil case the standard of proof is different. In a civil case the one bringing the action must satisfy the jury that he has proved his contentions by a fair preponderance of the credible evidence. In other words, a lesser standard than in the criminal case.

In determining whether the plaintiff here has carried his burden of proof, you take into your minds all

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of the evidence in the case, that which supports the plaintiff's contentions and that which supports the defendant's contentions, and you should then determine which has been the more convincing, which evidence gives you the correct version as you see it of the facts; which seems to you to make more sense. Of course here we are talking of common sense.

This does not mean that you should add up the number of witnesses on each side and actually balance them, because what we are talking about here is the quality of the evidence and not the quantity. Which evidence, in other words, is more likely to represent the true picture of what actually happened here.

Should you find that there is conflicting evidence, and if you find that this conflicting evidence is evenly balanced in your minds so that you are able to say that the evidence in either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely the plaintiff.

In short, what I am trying to say is this: I have said that the plaintiff has the burden of proving his case by a fair preponderance of the credible evidence. Now, we don't have any scales here in the courtroom on which you can in effect place the evidence and actually weigh it.

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But if you have served on a civil jury before, the Judge may have said what I am about to say to you now, and that is that you have to imagine in your minds the scales of justice, so to speak. The party having the burden of proof must tip that scale slightly in his favor. If it remains evenly balance or if it tips all the way down on the defendant's side, then the party carrying the burden of proof, that is the plaintiff, has not sustained that burden.

Now, this necessity to sustain the burden of proof applies to all of plaintiff's claims, including his claimed monetary losses.

As the jurors in this case, you have the important task of determining the credibility or believability of the witnesses who testified right here before you, so I want to tell you how you determine the credibility of the witnesses and how you determine the weight which you accord their testimony.

You have heard the witnesses, as I have said, and the question, therefore, is how do you determine the weight to be given to the testimony of the various witnesses; how do you determine if they are credible?

In your search for the truth you use your plain everyday common sense. That is why you are here. We certainly hope that you are average men and women and that

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you have brought to this case your common sense; that you haven't left it at the door of the courtroom when you came in here to sit on the jury. We want you to bring to this case your common sense and your daily experiences in life so that you can make an adjudication as to who is telling the truth and who is not.

As I have said, you have seen the witnesses who took the witness stand, but we also had testimony of witnesses presented to you by way of reading their testimony before trial. Most of the witnesses, however, testified in person, which gave you an opportunity to observe their demeanor and manner while on the witness stand.

Now, the questions which arise out of this are: How did they impress you? Did the witnesses appear to be testifying frankly, candidly, fairly? In other words, in evaluating the testimony and credibility of witnesses, as I have said you apply your common sense and experiences precisely as you do in determining an important matter in your own life when you have to decide whether or not someone has given you a true picture of a situation.

Now, almost every day of your lives you are called upon to make a determination as to whether you are going to believe someone or not and you draw on your common sense and experiences in connection with that determination. You are

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to do the same thing here.

You should consider, as I assume you naturally will and as I mentioned before, the witnesses' demeanor, his background, his candor, his lack of candor, possible bias, means of information, accuracy of recollection. You should consider whether the witness's testimony is supported or whether it is contradicted by other credible evidence and circumstances in the case.

You should consider whether the witness has an interest in the case. When a witness has an interest in the case there is a temptation to color or exaggerate testimony or possibly even to withhold damaging testimony. You should weigh all these factors throughout your deliberation, but interest is an element to be considered in determining the credibility of any witness and the weight to be accorded to his testimony.

If you find that any witness has made a material misstatement of fact with the intention of misleading you, you may disregard that portion of the witness's testimony which you do not believe or you may disregard all of it, or you may accept that part which you find reliable and disregard the rest of it.

You may also consider the strength or weakness of a witness's recollection, but sometimes while the witness

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may not be intending to deceive you he may have a weak recollection on the subject or be incapable of accurately setting forth what he observed or did, or even without realizing it he may not have been aware of the actual facts as they occurred and you may consider that in judging the credibility of a witness.

Now, I want to say a word about expert witnesses because we did have a doctor who testified here as an expert witness. You may recall that the doctor gave you testimony concerning his qualifications as an expert in this field. When a case involves a matter of science or art or some field requiring special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the information of the Court and the jury. The opinion stated by an expert is based upon particular facts as the expert himself observed them and testified to them before you or his opinion was based upon facts which the attorney who questioned him or attorneys who questioned him asked him to assume for the express purpose of stating an opinion based upon those assumed facts.

You may reject an expert's opinion if you find the facts to be different from those which form the basis of the expert's opinion. You may also reject his opinion if after careful consideration of all the evidence, expert

rgds 10 467a

and other, you disagree with the opinion. In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other evidence in the case. Such an opinion is subject to the same rules concerning credibility and reliability as I just explained as any other witness. It is given to assist you in reaching a proper conclusion and is entitled to such weight as you find the expert's qualifications warrant and must be considered by you, but it is not controlling on your judgment.

Now we come to the legal theory on which the plaintiff proceeds in this case. As I told you, the plaintiff predicates his case on an ancient maritime doctrine known as seaworthiness.

Plaintiff is entitled to recover if you find that the ship or vessel here was not seaworthy -- that is unseaworthy as we say -- at the time of the alleged accident and that that unseaworthiness was a proximate cause of the plaintff's injuries. This ancient maritime doctrine provides in essence that the owner of a vessel is under a duty which he cannot delegate to anyone else to provide and maintain a seaworthy vessel.

Naturally the question in your mind is what is meant in a case such as this by a seaworthy vessel. It

simply means that the vessel's owner is under an absolute duty, as I have said, which he cannot delegate to anyone else to see that the vessel itself and its deck, equipment, gear and crew are not defective. The best possible deck area, equipment, applicances and crew are not required and the vessel owner is not under a duty to provide such deck areas, equipment, appliances and crew which are reasonably fit for the use for which they were intended.

The duty to provide a seaworthy ship can be breached by the owner of a vessel by supplying defective equipment or by failing to supply equipment necessary for carrying out the job with reasonable safety.

It can also be breached by providing a work area which is not safe and adequate for the work to be performed or by providing a crew or crew members who are not reasonably competent, or by providing insufficient manual assistance to do a job, or insufficient supervision when and where required to do a job, or to perform a particular task in a safe and prudent manner, or by improper stowage of cargo aboard ship.

Under the doctrine of seaworthiness, the owner of a vessel is liable to pay damages to one injured on board the vessel if the vessel or its equipment or crew are found

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to be, as I have said, unseaworthy. This is true even though such unseaworthiness resulted from no fault on the part of the vessel owner or its employees or agents. In other words, if there is an unseaworthy condition and one is injured, the owner of the vessel is liable without fault on its part.

In determining the question of unseaworthiness, then, you will not consider whether the vessel owner had any actual or constructive knowledge of any defect in the stowage of the cargo as claimed by the plaintiff or whether the vessel owner's employees acted as reasonable men would have acted under the circumstances. In other words, you are not to consider how the vessel became unseaworthy if you find that it was unseaworthy.

If the vessel was unseaworthy and that unseaworthiness directly contributed to the plaintiff's injury, then the plaintiff is entitled to recover. The ship owner is liable for the acts of the longshoremen which result in an unseaworthy condition and that is because the ship owner is liable, as I have said, for any unseaworthy condition which results in injury no matter by whom the unseaworthy condition is caused, whether it is caused by its own employees or the stevedore's employees or anyone else. So if you find that the longshoremen, that is the stevedore's

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employees -- they are called longshoremen. A stevedore's employees are called longshoremen. If you find that they created an unseaworthy condition when they loaded the steel beams on board the vessel and that plaintiff was injured as a result of that, then the ship owner is liable.

In determining whether the cargo as stowed here created an unseaworthy condition you have to take into consideration whatever evidence there may be in the record as to the proper manner in which these steel beams are stowed. In determining whether the stowage of that cargo was unseaworthy you have to find that the stowage of those beams departed from the usual and customary method of stowing such beams.

Now, a working man working on board a ship such as the plaintiff does not assume the risk of injury from the unseaworthiness of a vessel. However, in nearly every occupation aboard ship there is some inherent and unavoidable risk which does not arise out of negligence on somebody's part or unseaworthiness. A workman must assume such risk when he enters upon his calling and goes on board ship to work. He does not, however, assume the risk of injury from even obvious dangers or conditions if the cause of the danger is the ship's unseaworthiness, including the ship owner's failure to provide a safe place to work or to provide him

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with proper tools to do the work or proper supervision or the failure to have properly stowed cargo.

If you find that the ship was unseaworthy, you must then determine whether such unseaworthiness was the proximate cause of the injury to the plaintiff here.

Now I am going to tell you what is meant by proximate cause. Proximate cause is that cause which in a natural and unbroken sequence of events, unbroken by any efficient intervening cause for which the defendant was not responsible, helped to cause the injury and consequent damages complained of by plaintiff. In other words, proximate cause means that there must be a direct causal connection between any unseaworthiness you find and the plaintiff's injuries.

To consitute proximate cause, that particular cause must actually contribute to the result. Therefore, plaintiff must prove by a fair preponderance of the credible evidence that the injuries which he sustained were proximately caused in whole or in part by the ship's unseaworthiness.

Plaintiff is not required to offer evidence which positively excludes every other possible cause of the injury which he sustained. It is sufficient if you find that the accident in question was an independent cause of injury or

was an accelerating, provoking, irritating or hastening factor in the ultimate results. That is to say you are not to find against plaintiff simply because he may have had a preexisting condition or illness or a prior accident.

The vessel owner in this case, in addition to denying that vessel was unseaworthy and in addition to denying that if there was any unseaworthiness, it was the proximate cause of the plaintiff's injury, the vessel owner alleges as a further defense that negligence on the part of the plaintiff was the proximate cause of any injuries and consequent damages which the plaintiff may have sustained.

This is known as the defense of contributory negligence and I want to tell you what contributory negligence is. Contributory negligence is fault on the part of a person injured which is entirely responsible for the accident or which contributed in some measure to the accident.

In maritime cases such as this a plaintiff who has been negligent in part is not barred completely from recovering from the defendant. He is barred completely from recovery only when you find that his negligence alone was completely responsible for the accident.

In determining whether plaintiff was contributorily negligent, you must consider that the plaintiff is required as his obligation to the defendant to use reasonable care

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to avoid anything that will cause injury to himself.

If you find that plaintiff omitted to do anything which a reasonably prudent man would do under the circumstances of this case or that he did something which a reasonably prudent man would not do and that it brought about and contributed to his accident, then you must find that the plaintiff was guilty of contributory negligence. In short, plaintiff is held to exercise that reasonable degree of care which a person with his experience would have used under the circumstances.

Now, contributory negligence is an affirmative defense and consequently the burden of proving that the plaintiff was contributorily negligent as the vessel owner claims is on the vessel owner. The vessel owner has to prove that the plaintiff contributed to the accident.

In seeking to establish plaintiff's contributory negligence, a defendant must prove that negligence by a fair preponderance of the credible evidence. In other words, the defendant on this issue of contributory negligence has the same standard to meet as the plaintiff in proving his claims. That is the vessel owner must prove plaintiff's contributory negligence by a fair preponderance of the credible evidence.

In considering the issue of contributory negligence,

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it is your duty to consider all the evidence which has been introduced, whether by the plaintiff or by the defendant. If you should find that plaintiff's negligence alone was entirely responsible for the accident, then, of course, you would return a verdict for the defendant vessel owner.

If, on the other hand, you should find from a preponderance of the evidence in the case that the vessel was unseaworthy but that plaintiff himself was also negligent and that plaintiff's fault also constituted a proximate cause of the injuries which he sustained, then since this is a maritime case you compare the fault of the parties and return a verdict in favor of the plaintiff in a reduced amount based upon the comparison. Of course, if you find from all the evidence that the plaintiff was not contributorily negligent, then you would not take that into consideration.

The proper procedure to be followed by the jury in comparing the negligence of the parties if you find that there was some negligence on the part of the plaintiff which contributed to his accident, then you have to follow this procedure:

First you determine the full amount of all damages sustained by the plaintiff as a proximate result of the accident. When you have gotten that full amount you then compare the fault of the parties, as I have said, by

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determining in what proportion, expressed in terms of a percent, plaintiff's own fault contributed to his injuries. Then you deduct from the full amount all the damages awarded to plaintiff a sum equal to that percent of the total which you have found if you so find was caused by the plaintiff's contributory negligence and then you return a verdict in favor of the plaintiff for the reduced amount.

On the interrogatories which we are handing you there is a place for you to set that forth if you should so find.

Now we come to the issue of damages. If on all the evidence you find that the plaintiff has sustained his burden of proof that the vessel was unseaworthy and that the vessel's unseaworthiness was a proximate cause of plaintiff's injuries, then and only then do you reach the question of damages.

Of course, if plaintiff has failed to prove the vessel unseaworthy that would end the case. You do not consider the issue of damages at all, you return a verdict for the defendant.

Incidentally, the fact that I instructed you on the issue of damages does not mean that you are to assume that the Court is of the view that the plaintiff is entitled to a verdict or indeed that the Court has an opinion as to

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how you are to decide the case. That is, as I have already told you, exclusively your function, but, of course, I must instruct you on the issue of damages in the event that the plaintiff is entitled to damages.

The purpose of the law is to award as far as possible just and fair compensation for the loss which directly flowed from the wrong done to the plaintiff. The damages awarded must be purely compensatory and reasonable, neither inadequate nor excessive.

The matter of damages rests in your sound discretion. You will be guided by your common sense and experience, but your award must bear a reasonable relationship to the injuries and monetary damages actually suffered by the plaintiff.

In assessing damages your aim should not be to make the plaintiff rich at the expense of the defendant. Personal feelings or sympathy or bias or prejudice should not enter into your consideration. Your aim should be, as I have said, to award the plaintiff a sum of money which will be fair and reasonable compensation for the losses suffered as a result of the accident. Again, plaintiff has the burden of proof with respect to the nature and extent of his injuries and with respect to the resulting monetary losses such as lost wages or medical expenses directly

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attributable to the accident.

Now, the plaintiff is entitled to damages for the following if you find for the plaintiff on the issue of unseaworthiness and proximate causes I have said:

First, he is entitled to be compensated for any pain and suffering, including mental anguish. That is pain and suffering incurred by the plaintiff from the date of the accident to the present, inlcuding any time spent in the hospital.

Then he is entitled to recover any lost wages. That is wages lost as a result of the accident from the date of the accident to the present.

Then he is entitled to recover for any future pain and suffering, including mental anguish which you may find he is likely to suffer in the future and I will explain that further to you in a moment.

Then he is entitled to recover any lost wages in the future. That is future wages if you find that his earning capacity in the future has been impaired as a result of this accident.

Then he is also entitled to recover any medical expenses which the evidence shows were incurred.

Now I want to discuss each of these items of damage in a little more detail. First pain and suffering. If you

find that the plaintiff has already incurred pain and suffering and if you find that plaintiff is reasonably certain to indure pain and suffering in the future as a result of the accident, as I have said, he is entitled to be compensated for it. That is past pain and suffering and future pain and suffering.

Here, however, I must tell you that there is no yardstick for measuring pain and suffering. The only yardstick is your own common sense and good judgment based upon the evidence in the case. In other words, there is no hard and fast rule governing the amount which you award a plaintiff in a case like this for pain and suffering in the past or in the future. Your award, however, must be based on a full consideration of all the credible evidence of the case and must bear a reasonable relationship to that evidence as to the nature and extent of the plaintiff's injuries, that is whether they are permanent or only temporary in nature, and as to the pain and suffering which the evidence shows the plaintiff has already endured and is reasonably certain to endure in the future as a result of this particular accident.

You are not permitted to award speculative damages. This means you are not to include in any verdict compensation for prospective losses which although possible are

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wholly remote and conjectural. Any award for future pain and suffering must therefore be based on a finding by you from a consideration of all the evidence that there is a reasonable likelihood that plaintiff will experience pain and suffering in the future.

Now, as I told you this concept of pain and suffering includes mental suffering or mental anguish. Mental anguish or mental suffering may arise out of physical injury and depends upon the nature and extent, character and probable duration of the injury and whether it is permanent in nature or only temporary in nature. If you find that by reason of the nature and extent of his injuries plaintiff has suffered mental torment or anguish, or if you find that as a consequence of his injuries plaintiff is handicapped in performing tasks and activities of day-to-day living and that these handicaps have in turn caused plaintiff mental anguish, and if you find that such handicaps and consequent mental anguish will continue or that there is a reasonable likelihood that they will continue in the future, you may consider this in assessing damages for pain and suffering.

The law includes within the term mental suffering or mental anguish the following elements: Anxiety, worry, humiliation, mortification or embarrassment.

With regard to future pain and suffering, plaintiff

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has the burden of proving, as I have said, that there is a reasonable likelihood that he will experience pain and suffering in the future. Now, if plaintiff has sustained his burden with respect to this, your computation of any award for future pain and suffering must take into account the period of time over which it is reasonably certain that pain and suffering will be sustained. Now, this means that you must take into consideration the plaintiff's life expectancy.

In addition, any award for future pain and suffering must be discounted to its present value, and I will explain in a few moments how that is to be done.

According to a life expectancy table as shown on this chart, and which the Court has received in evidence as a Court's exhibit, the life expectancy in this country of a male person sixty-six years of age today is 12.6 years. Now, this fact may be considered by you in arriving at the amount of damages, if any, to be awarded for future pain and suffering.

I want to point out that life expectancy, as shown by a life expectancy table, is merely an estimate of the probable average remaining length of life of all persons in the United States of a given age and sex and that estimate is based upon a limited record of experience.

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So the inference which may reasonably be drawn from life expectancy as shown by the table applies only to one who has the average health and exposure to danger of people of that age and sex.

In determining the reasonably certain life expectancy of the plaintiff, the jury should consider in addition to whatever is shown by life expectancy tables all other facts and circumstances in evidence bearing upon the life expectancy of this plaintiff, including his occupation, his habits, his past health record, his health at the time of the accident and his present state of health.

Now, in addition to claiming lost wages from the date of the accident to the present, the plaintiff also claims future lost earnings resulting from reduced earning capacity. That is earningswhich he claims he would have received in the future had he not not sustained a diminution of his future earning capacity as a result of this accident.

In connection with plaintiff's claim for lost future earnings, plaintiff again has the burden of proving that there is a reasonable likelihood that but for the accident he would have had greater earning capacity or he would have continued to work in the future.

In this connection you must take into consideration

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plaintiff's work life expectancy and you must bear in mind the difference between life expectancy and work life expectancy.

According to this table again, the plaintiff's work life expectancy is 5.9 years. However, the inference which reasonbly may be drawn from work life expectancy tables only applies to one who has the average health and exposure to danger of people of that age and sex. The jury should also consider in addition to what the tables indicate all other facts and circumstances in evidence bearing upon the work life expectancy of the plaintiff, including his occupation, past health record and present state of health.

Any award for anticipated future lost earnings must be discounted to its present worth as is true of any award for future pain and suffering and now I shall explain to you how that is done.

As I have said, if the jury should find that the plaintiff is entitled to a verdict and further finds that the evidence in the case establishes that there is a reasonable likelihood of future lost earnings and future pain and suffering, then it becomes the duty of the jury to ascertain the present worth of any award it makes for these items of damages, since the award of future damages necessarily requires that payment be made now for a loss that

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will not actually be sustained until some future date. Under the circumstances, the result is that the plaintiff will be reimbursed in advance of the loss and so will have the use of that money which he would not otherwise have received until some future date for the verdict.

Now, in order to make a reasonable adjustment for the present use interest free of money representing a lump sum payment of anticipated future loss, the law requires that the jury discount or reduce its present worth the amount of the anticipated future loss by taking, one, the interest rate which plaintiff could reasonably be expected to receive on an investment today of the lump sum payment together with, two, the period of time over which the future loss is reasonably certain to be sustained and then deduct from the total award from that anticipated future loss whatever that amount would be reasonably certain to earn or return if invested at such a rate over such future period of time and include in the verdict an award for only the present worth, the reduced amount of the total anticipated future loss.

Now, this computation is readily made by using the so-called present value tables on the back of this card and explains to you exactly how that is done. If you arrive at that point you may send for this card when you go into

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the jury room to deliberate, if you arrive at a point of damages and if you arrive at the point of considering future lost wages and future pain and suffering. It gives interest rates on here which you may use up to six percent and I suggest that you use a rate which is not less than five percent.

After you have made an award for each item of damage which I have just explained, if you arrive at that point and you have gone through all these computations you must deduct any percent of contributory negligence which you find plaintiff contributed to the accident if you find that he was contributorily negligent as I explained before. You would deduct this expressed in terms of a percent from the total award of all items of damages.

If you make an award to plaintiff, the amount so awarded is not subject to Federal or State income taxes and no amount may be added to the award believing that it would be subject to State or Federal income taxes.

As I have told you, I am going to let you first consider the plaintiff's case against the vessel owner, which I have just charged you on. The most important part of this case is the part which you as jurors are about to play because it is for you and you alone to determine whether the plaintiff has sustained his burden of proof of the

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issues and if he has, what amount he shall be awarded for each item of damage.

I know you will try the issues that have been presented to you according to the oath which you have taken as jurors. In that oath you have promised that you would well and truly try the issues joined in this case and a true verdict render. I suggest to you that if you follow that oath and try the issues without combining your thinking without any emotions, you will arrive at a true and just verdict. It must be clear to you that once you get into an emotional state and let fear or bias or emotion or sympathy interfere with your thinking, then you will not arrive at a true and just verdict.

Now, as you deliberate, ladies and gentlemen, please be careful to listen to the opinions of your fellow jurors, as well as to ask for an opportunity to express your own views. No one juror holds the center stage in a jury room and no one juror controls or monopolizes the deliberations.

If after listening to your fellow jurors and if after stating your own view you become convinced that your view is wrong, do not hesitate because of stubbornness or pride of opinion to change your view. On the other hand, do not surrender your honest conviction solely because of

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the opinion of your fellow jurors or because you are outnumbered.

In answering these questions relating to the plaintiff's case, your answer as to each question must be unanimous and must reflect the consciencious conviction of each and every one of you.

Mr. Clerk, would you hand this interrogatory to the foreman of the jury.

Madam Foreman, you take that into the jury room and you record on there the answers of the jury, the unanimous answers of the jury to each question. I suggest you read it thoroughly first before attempting to answer any question.

Now, you are instr cted that you are not to reveal the standing of the jurors, that is the split of the vote if that should occur, to anyone, including the Court at any time during your deliberations and when you go into the jury room you may send for any exhibits which you would like to see or have any testimony read back to you.

After you have answered those questions I am going to submit to you another piece of paper and instruct you further regarding the vessel's case against the two third-party defendants here, International Terminal Operating Company and Court Carpentry & Marine Contracting Company.

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Now, International Terminal Operating Company is the stevedoring company and Court Carpentry & Marine Contracting is the plaintiff's employer, the carpentry company.

So as I have said, I will instruct you further before you answer these questions, but you may now deliberate on the first cause of action.

Will the Clerk please swear the marshal.

[One marshal was duly sworn]

THE COURT: All right, the jurors may now follow the marshal to the jury room. You may eat your lunch and then proceed to your deliberations.

[At 1:03 p.m. the jury retired to deliberate upon a verdict]

MR. SERGI: Your Honor, no exceptions and no further requests to charge on behalf of the plaintiff.

THE COURT: Any exceptions to the charge?

MR. MOLANPHY: Yes, your Honor.

THE COURT: Put them on the record, please.

MR. MOLANPHY: Yes, m'am. The defendant and third-party plaintiff respectfully excepts to your Honor's charge of a duty to provide plaintiff with a safe place to work. I believe that is a negligence concept, your Honor, and doesn't come under the warranty of seaworthiness.

Secondly, I don't believe there has ever been a

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claim or any proof offered as to mental torment or anguish either as to the past or the future in this case.

I respectfully except further to your Honor's charge allowing the jury to consider the element of future lost earnings as initially moved by Mr. Testa.

Finally, I would ask your Honor to charge in conformity with the defendant and third-party plaintiff's request to charge No.4, the second part of that.

THE COURT: I am not taking any requests to charge now. Just put your exceptions to the charge as made on the record. I am not going to charge the jury further.

MR. MOLANPHY: Do I take it your Honor wants no reference to requests that were previously filed with the Court?

THE COURT: That is on the record, whatever you requested to charge and what I didn't charge is plain.

MR. MOLANPHY: Thank you, your Honor.

THE COURT: If you have any exceptions you can put them on the record.

MR. HOCKETT: If the Court please, the third-party defendant International Terminal Operating Company joins with the defendant and third party plaintiff on the first three exceptions.

THE COURT: On the what?

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MR. HOCKETT: The first three exceptions that he noted for the record.

THE COURT: All right. Mr. Testa?

MR. TESTA: If your Honor please, on behalf of the third-party defendant Court Carpentry I also join in the exceptions made by Mr. Molanphy and I would also like to point out to the Court that your Honor indicated to the jury that the tables that you have were received in evidence and I don't believe they were.

THE COURT: I just did that so that the jury could take this into the room with them. That's clear on the record, and as I told you, the reason I did it is because the Second Circuit has ruled that the Court must do it whether requested or not and this is to enable to the jury to make the discount of any award for future pain and suffering, future lost wages to its present value and they can't do it in their heads except by the use of that table. So it is received in evidence as a Court's exhibit and the jury has been instructed they can send for it.

MR. TESTA: I would further take exception to your Honor's charge that the plaintiff's work expectancy is 5.9 years, your Honor.

THE COURT: All right. Anything else?

MR. TESTA: No.

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THE COURT: You can recess now until 2:00 o'clock, gentlemen. I guess the jury will be a little while, anyway, so we can have our lunch, but I want to say you are to come back at 2:00 o'clock so that if the jury should send for anything or want any testimony read back we don't have to look for four lawyers. So you come back at 2:00 o'clock.

xx [Court's Exhibit 2 marked]

[Recess]

[At 2:00 o'clock p.m. a note was received from the jury]

[In the robing room]

THE COURT: Gentlemen, we have a note from the jurors which will be marked Court's Exhibit 3, which reads as follows:

"Please give us all information, all exhibits of the case. Thank you."

I don't know what they mean by "all information," but we will send in all exhibits.

This will be 3, Mr. Clerk.

xx [Note marked Court's Exhibit 3]

THE COURT: Do you want to see the note, gentlemen?

MR. SERGI: No.

THE COURT: Do you have all the exhibits?

MR. SERGI: Yes, your Honor.

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THE COURT: Read them off for the record as to what we are sending in.

MR. SERGI: Plaintiff's Exhibit 1 was the hospital record, 2 was the earning record, 3 is the ship's profile and plan, 4 was the ship's log with the translation and 5 was the accident report from Auletti, the foreman.

Third party defendant Court Carpentry & Marine Contracting Co. Exhibit A was Dr. Tagliagambe's report dated 5/24/70. That's all the exhibits I know of.

THE COURT: Your Exhibit 6 was not in, it was just marked for identification?

MR. SERGI: Yes. That was marked for identification.

THE COURT: All right, thank you, gentlemen.

[Recess]

[At 2:35 p.m. a note was received from the jury]

[In open court - jury not present]

THE COURT: We have another note from the jury, which will be marked Court's Exhibit 4, which reads as follows:

"May we have recorder's record of the Judge's charge as pertains to seaworthiness. Thank you."

I gather what they want is the Court's charge on seaworthiness read back.

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Do you want to look at it?

xx [Note marked Court's Exhibit 4]

THE COURT: Bring the jury in.

[Jury present]

THE COURT: Ladies and gentlemen, I have your note, which reads:

"May we please have recorder's record of the Judge's charge as pertains to seaworthiness. Thank you."

The reporter has just found that portion of the charge relating to unseaworthiness, so he will read that to you.

[Record read]

THE COURT: All right, you may return to the jury room.

[At 3:00 o'clock p.m. the jury returned to the jury room to continue deliberating upon their verdict]

[Recess]

[At 3:40 p.m. the jury returned to the courtroom]

THE CLERK: Members of the jury, please answer as your name is called.

[Jury roll called - all present]

THE CLERK: Madam Forelady, have you agreed upon a verdict?

MADAM FORELADY: Yes, we have.

THE CLERK: Will you please read the questions and your answers to those questions that were submitted to you.

MADAM FORELADY: Question No.1: Has the plaintiff sustained his burden of proving that the vessel was unseaworthy? Yes.

Question No.2: If the answer to question No.1 is yes, has the plaintiff sustained his burden of proving that such unseaworthiness was the proximate cause of his injuries and damages? Yes.

No.3: If the answer to question No.2 is yes, what amount do you award to the plaintiff for the following:

1. Lost wages from the date of the accident to the present? $40,600.

2. Anticipated future lost wages discounted to present value? None.

3. Medical expenses date of accident to present? $1,600. All.

4. Pain and suffering from the date of the accident to the present? $10,000.

Present pain and suffering discounted to its present value? $5,000.

Total of all damages, $57,200.

4. Has the vessel sustained its burden of prov-

ing that the plaintiff was contributorily negligent? Yes.

5. If the answer to question No.4 is yes, in what degree expressed in terms of a percentage was the plaintiff contributorily negligent? 25 percent.

6. If you find that the plaintiff was contributorily negligent and have determined the percentage, subtract this percentage from the total amount awarded to the plaintiff for damages.

Total amount: $57,200.

Minus contributory negligence: $14,300.

Final award: $42,900.

THE COURT: With respect to the remainder of the case, I want to instruct you further and submit to you this second sheet of questions.

The first question which I am going to submit to you reads as follows:

Has the vessel owner sustained its burden of proving that the stevedore company which loaded the steel beams onto the vessel breached its implied warranty of workmanlike performance with respect to that task? You answer yes or no.

The second question is: If the answer to question 1 is yes, was the stevedore's action the proximate cause of the plaintiff's injuries? Yes? No?

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The next question relating to the vessel owner's action against the Court Carpentry is: Has the vessel owner sustained its burden of proving that the plaintiff's employer, Court Carpentry, breached its implied warranty of workmanlike performance by failing to notice and remedy or cause to be remedied a dangerous condition? Yes? No?

If the answer to question 1 is yes, was it Court Carpentry's failure to notice and remedy, or cause to be remedied the dangerous condition the proximate cause of plaintiff's injuries? Yes or no?

Before answering those questions I am going to instruct you further and ask you to bear in mind everything that I have instructed you previously on with respect to burden of proof and credibility of witnesses.

The stevedore who undertakes to perform the ship owner's stevedoring operations impliedly agrees to perform its service in a workmanlike fashion. That is with reasonable safety. The question, therefore, is whether ITO, the International Terminal Operating Company, breached what we call its implied warranty of workmanlike performance. On this issue the vessel owner has the burden of proof. That is, it must prove by a fair preponderance of the credible evidence that the stevedore in loading the steel beams onto its vessel breached its implied obligation or agreement to

rgds 39

perform that service in a workmanlike fashion.

Now, if you find that the stevedore or one of its employees failed to perform its stevedoring operations with reasonable safety and that this was the proximate cause of the plaintiff's accident, you would find for the ship owner on the indemnification claim. However, the law does not require perfection in the performance of a stevedoring service. If you should find that the stevedore performed its work in a workmanlike manner, then the ship owner is not entitled to indemnity.

In its claim against the stevedoring company, as I have said the ship owner has the burden of establishing its claim by a fair preponderance of the credible evidence. Thus, even if you find in favor of the plaintiff in this action against this ship owner, you may not find in favor of the ship owner against the stevedoring company unless you find by a fair preponderance of the credible evidence that the plaintiff met with this accident because of the failure of the stevedoring company to perform its job in a workmanlike manner and with reasonable safety to persons and property.

In order for the ship owner to recover, it must prove that the stevedore's breach of its warranty of workmanlike service was the proximate cause of the plaintiff's

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injuries. If the ship owner has sustained this burden it is entitled to recover against the stevedoring company for whatever amount the plaintiff has been awarded.

Now, finally we come to the vessel owner's claim against the plaintiff's employer, Court Carpentry. The sole issue as between the vessel owner and Court Carpentry with regard to liability is this: Court Carpentry is liable to the vessel owner if the vessel owner has proved, again by a fair preponderance of the credible evidence, that Court Carpentry breached its duty to perform lashing services in a workmanlike manner by failing to inspect the work site where plaintiff and his fellow employees were to perform lashing services, and if that failure was the proximate cause of plaintiff's accident and injuries.

Now, again on this issue, the vessel owner has the burden of proof. That is the vessel owner must prove, as I have said, by a fair preponderance of the credible evidence in this case that Court Carpentry, which was hired by the vessel owner to do lashing and carpentry work on board the vessel, breached its duty to perform lashing services in a workmanlike manner and that this failure was the proximate cause of plaintiff's injuries.

In connection with the ship owner's claim for indemnity against Court Carpentry, plaintiff's employer,

rqds 41

the law does not require perfection in the performance of marine lashing services. If you find that the Court Carpentry Company performed its work in a reasonably workmanlike manner, then the ship owner is not entitled to recover indemnity.

Court Carpentry had no legal obligation or duty to check the ship or correct every latent or hidden defect and dangerous condition on board the vessel that may have existed in the ship's gear or equipment before sending its men aboard. It is not responsible for latent, that is hidden defects not discoverable by cursory inspection.

If you find that Court Carpentry was not responsible for any condition by reason of which the plaintiff may recover against the ship owner and did not do or failed to do anything which might have caused or contributed to the happening of plaintiff's accident, then the ship owner is not entitled to recover indemnity from Court Carpentry.

Now, the basis of the vessel's claim is that Court Carpentry's duty to perform its services in a workmanlike manner includes the duty to remedy certain dangerous conditions. The law is that the carpentry company which sends its men on board ship has a duty to remedy or have the ship's crew remedy or the stevedore remedy a dangerous condition that exists for a period sufficient for the carpentry company to have had constructive notice thereof.

rgds 42

That is, the carpentry company is liable if, as I said, the dangerous condition existed for a period sufficient for it to have had constructive notice. The carpentry company is not charged with knowledge of a defect unless its employees became aware of the condition in time for it to be corrected or its employees should have been aware of the dangerous condition in time for it to be remedied.

Now, again on this issue the vessel owner has the burden of proof and I want to remind you again of what I said earlier about how to deliberate, that your verdict, your answer to each of these questions must be unanimous.

All right, now, Mr. Clerk, would you hand to the jurors that second set of interrogatories.

You may now go into the jury room to deliberate on those matters.

[At 4:00 o'clock p.m. the jury again returned to the jury room to continue deliberating upon their verdict]

MR. SERGI: Your Honor, may I now be excused? I am not part of the rest of this action.

MR. MOLANPHY: May I say something before Mr. Sergi leaves, your Honor?

THE COURT: Yes. I think maybe you should stay, Mr. Sergi.

MR. MOLANPHY: With respect to the verdict just

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rendered in plaintiff's favor, I would respectfully request the 10 days permitted by Rules to make any such motions as may be proper.

THE COURT: Yes, you have them. The other parties have the same time.

MR. MOLANPHY: As the jury begins its deliberation, your Honor, may I respectfully move for a directed verdict on the ship owner's claim against the stevedore on the ground that the sole grounds upon which the jury could have found the vessel owner liable to the plaintiff would be on the grounds of improper stowage of cargo creating an unseaworthy condition and that I believe on the basis of that finding I am entitled to indemnity on the claim-over against the stevedore which actually created this condition under the doctrine as set forth in the Ryan case and the Italia case.

If I may just for a moment quote one passage from the Italia case, which is cited in my trial memorandum. The quote is on page 11 of my trial memorandum and it quotes from the Italia Societa against Oregon Stevedoring Co.,Inc., 376US315 at page 318. The quote is as follows:

"In Ryan against Pan Atlantic Corp., 350US124, the landmark decision in this area, it was established that a stevedoring contractor who enters into a service agreement

with the ship owner is liable to indemnify the ship owner for damages sustained as the result of the stevedore's improper stowage of cargo."

I believe that entitles the ship owner in this case for indemnity as a matter of law against the stevedore which admittedly stowed this cargo in question.

MR. HOCKETT: If the Court please, I would like to oppose the motion for a directed verdict against the third-party defendant ITO and base this opposition on the fact that simply because the jury finds the unseaworthy condition absent anything by way of proof on the part of the ship owner against this third-party defendant, that it, the third-party defendant ITO, did its job in an unworkmanlike performance, it cannot be, number one, a directed verdict and, number two, it in fact should be a directed verdict against the ship owner by ITO and for a verdict dismissing the ship's action over against the third-party defendant ITO.

The testimony that has been adduced is absolutely void of any testimony with respect to stevedoring practices or of their alleged breach of any workmanlike performance. The fact that the jury found an unseaworthy condition alone of itself does not imply out of hand that the stowage of the cargo by the longshoremen was done other than properly;

than the burden of proof and the quality of proof necessary to prove an unseaworthy claim against the ship is entirely different than the burden and quality of proof needed to sustain an indemnity action against the stevedore.

I submit once again that there has been absolutely no proof presented in this case to show that the stevedore in fact breached through its action any of the implied warranties of workmanlike performance, nor has there been any proof that they had deviated from the custom and practice in the trade with respect to longshoring and of stowing cargo of this sort.

In effect, then, it is not the same as saying that since the ship owner is found liable for unseaworthiness that it would follow that the stevedore was in turn guilty of some breach of warranty of workmanlike performance; that there are other avenues or areas which the ship could have been made unseaworthy in this particular instance, including the actions of the co-third-party defendant, Court Carpentry, and of its employee, the plaintiff Jackson O. King in not taking the necessary safeguards to secure his own safety. The jury has already so determined this and this conceivably could be the basis upon which the ship was held liable.

For all these reasons I move at this time for a

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verdict directed in favor of ITO against the ship owner on its claim for indemnity over.

THE COURT: Both of those motions are denied.

Anything else?

MR. MOLANPHY: Yes, your Honor. At this time I would like to move for a directed verdict on the ship owner's claim against the third-party defendant Court Carpentry & Marine Contracting Company on the grounds that the jury in its first verdict found the plaintiff to have been guilty of twenty-five percent contributory negligence; that under the doctrine as announced by the Court of Appeals for the Second Circuit in Mortonson against A/S Glittre, 348 F.2d 383, McLoughlin against Trelleborgs, 408 F.2d 1334, and finally the Hartnett case -- that is Hartnett against Reiss Steamship Company, 421 F.2d 1011, that contributory negligence of the plaintiff is on the action for indemnity against his employer attributed to his employer and it becomes a basis of a directed verdict as it was in each of those cases for the ship owner on the indemnity claim against the employer.

THE COURT: What were the facts in those cases?

MR. MOLANPHY: Mortonson was an employee of a painting company.

THE COURT: An employee of what?

MR. MOLANPHY: An employee of a painting company.

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He and a fellow longshoreman were painting skylights -- a fellow painter were painting skylights aboard the defendant's vessel and one of them slipped and fell, striking the scaffold on which his fellow painter, the plaintiff, was working causing the plaintiff to fall from the scaffold and sustain injuries. The plaintiff had earlier in the day seen the condition which caused his fellow worker ultimately to slip. I think it was oil on the skylight. Contrary to his obligation, he did not report this. He did nothing about it and the condition remained until such time as the co-worker slipped on it. Mortonson was held by the jury to have been contributorily negligent and his recovery was diminished because of that.

Before submitting the remaining indemnity against the paint company to the jury, the trial Court entertained the ship owner's motion for a directed verdict on the grounds that this man --

THE COURT: You mean in that case the jury first decided the plaintiff's claim against the vessel owner as in this case?

MR. MOLANPHY: Right, your Honor.

THE COURT: And then the Court submitted the claim-over --

MR. MOLANPHY: The Court --

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THE COURT: Before submitting the claim-over, is that it?

MR. MOLANPHY: The verdict was directed in the ship owner's favor and the same thing happened in McLoughlin.

THE COURT: What percentage of contributory negligence was found in that case?

MR. MOLANPHY: Your Honor, they have run the gamut. It was one percent. In Hartnett against Reiss it was one percent.

THE COURT: That is the case you are talking about?

MR. MOLANPHY: No. McLoughlin I think is something like fifty-six percent and Mortonson I think was thirty-three and a third.

THE COURT: On that basis --

MR. MOLANPHY: The District Court directed a verdict against the employer third-party defendant.

THE COURT: For the full amount of the verdict?

MR. MOLANPHY: For the full amount, yes, your Honor.

MR. TESTA: May I be heard at this point, your Honor?

THE COURT: Yes.

MR. TESTA: These cases Mr. Molanphy is referring to deal with situations -- I think both Mortonson and

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McLoughlin dealt with a slip on oil. In the Mortonson case it was oil and also in the McLoughlin case they were working with some oily nuts and bolts, but this was a condition that the third-party defendant was aware of and knew about and may have even created themselves.

There is a big difference between these cases and this case where there is no proof whatsoever that the third-party defendant in this case had anything to do with creating this condition. In fact the proof is to the contrary. There is no doubt that in this case ITO created this condition. Court Carpentry had nothing to do with this condition. This is the big difference here.

These cases do not mandate a directed verdict in every case where there is a finding of contributory negligence on the part of the plaintiff. They did direct a verdict in those cases because of the facts in those cases, which indicated that the condition was either known to the third-party defendant or had been created by the third-party defendant and hadn't been remedied or corrected.

THE COURT: I will reserve decision on that.

MR. MOLANPHY: May I say something?

THE COURT: No, you may not. I said I will re-

-- it.

-- our requests to

rgds 50

charge be deemed denied insofar as they weren't given by the Court?

THE COURT: That is automatically denied.

[At 4:10 p.m. the jury returned to the courtroom]

THE CLERK: Members of the jury, please answer as your name is called.

[Jury roll called - all present]

THE CLERK: Madam Forelady, will you please read the questions and the answers to those questions.

MADAM FORELADY: A. Claim of vessel owner against stevedore for indemnity.

1. Has the vessel owner sustained its burden of proving that the stevedore company which loaded the steel beams onto the vessel breached its implied warranty of workmanlike performance with respect to that task? Yes.

2. If the answer to question 1 is yes, was the stevedore's action the proximate cause of the plaintiff's injuries? Yes.

B. Claim of vessel owner against Court Carpentry for indemnification..

1. Has the vessel owner sustained its burden of proving that the plaintiff's employer, Court Carpentry, breached its implied warranty of workmanlike performance by failing to notice and remedy, or cause to be remedied a

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dangerous condition? No.

THE COURT: Thank you very much, ladies and gentlemen.

[Jury excused]

THE COURT: Mr. Clerk, you have both of these verdicts now. May I see the second one.

With respect to your motion, Mr. Molanphy, I think that probably we would have to brief the problem. I have tried to read these cases hurriedly and in two of them it does appear that the third-party defendant was responsible for the entire accident and in the third case, that is the Hartnett case, is a little more complicated. That is the one with the one percent.

MR. MOLANPHY: Yes, your Honor.

THE COURT: In there they pointed out that there was other evidence from which the jury could probably find a breach of warranty. There was nothing other than Hartnett's contributory negligence which we would say was a breach as a matter of law.

MR. TESTA: May I be heard, your Honor?

THE COURT: Just a minute.

So they did rule there that contributory negligence was a breach as a matter of law.

With respect to the rest of it, what the jury

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simply did was to divide the liability between the two third-parties there and the Court ruled that it would not disturb that verdict and it seemed just to them in that situation.

What we have here is the contributory negligence as a matter of law, but we now have the jury's verdict that the third-party was not responsible for failing to remedy this dangerous condition. So all we have is the contributory negligence of this plaintiff.

As we said before, the jury has already reduced the plaintiff's award by that amount, twenty-five percent. With respect to the rest of it, as I said the jury has now said that Court Carpentry didn't breach its duty of workmanlike performance so that it is a difficult question, so we will have to brief that and you will have ten days, as I said, to make that motion and then support it by a brief.

MR. MOLANPHY: Thank you, your Honor.

THE COURT: You will have the same time, Mr. Testa.

MR. TESTA: Yes. I realize that.

But just for the record, your Honor, at this time in view of the finding by the jury that there was no breach of the warranty of workmanlike performance on behalf of my client, Court Carpentry, at this time I would like to move to dismiss the third-party complaint and for a directed verdict in favor of Court Carpentry.

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THE COURT: You have ten days to make that motion and support it by a brief.

MR. TESTA: All right, your Honor.

THE COURT: We have just gone over that.

All right, gentlemen, thank you very much.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE DAMPFS-GES.,

68 CIV. 3374

Defendant and
Third Party Plaintiff.

- x

SPECIAL QUESTIONS SUBMITTED TO THE JURY IN ACCORDANCE WITH RULE 49 OF THE FEDERAL RULES OF CIVIL PROCEDURE

1. Has the plaintiff sustained his burden of proving that the vessel was unseaworthy?

YES X

NO ____

2. If the answer to Question 1 is Yes, has the plaintiff sustained his burden of proving that such unseaworthiness was the proximate cause of his injuries and damages?

YES X

NO ____

3. If the answer to Question 2 is Yes, what amount do you award to the plaintiff for the following:

(1) Lost Wages from the date of the Accident to the Present. 40,600

(2) Anticipated Future Lost Wages — Discounted to Present Value NONE

MEDICAL EXPENSES FROM THE DATE OF THE ACCIDENT TO THE PRESENT — 1,604.00

(3) Pain and Suffering from the date of the Accident to the Present — 10,000

(4) Future Pain and Suffering — Discounted to its Present Value — 5,000

TOTAL OF ALL DAMAGES — 57,200

4. Has the vessel sustained its burden of proving that the plaintiff was contributorily negligent?

YES X

NO _____

5. If the answer to Question 4 is Yes, in what degree expressed in terms of a percent, was the plaintiff contributorily negligent?

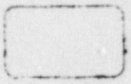
25%

6. If you find that the plaintiff was contributorily negligent and have determined the percent, subtract this percentage from the total amount awarded to the plaintiff for damages.

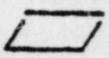
Total Amount — 57,200

Minus % of Contributory Negligence — 14,300

FINAL AWARD — 42,900



NOTE: If you find that the plaintiff has failed to sustain his burden of proving that the vessel was unseaworthy and/or that this unseaworthiness was the proximate cause of his injuries then, of course, you will return a verdict in favor of the vessel owner by checking the space below.

 WE THE JURY FIND IN FAVOR OF THE VESSEL.

514a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE DAMPFS-GES.,

Defendant and Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC., and COURT CARPENTRY AND MARINE CONTRACTING CO.,

Third-Party Defendants.

- x

68 CIV. 3374

SPECIAL QUESTIONS SUBMITTED TO THE JURY IN ACCORDANCE WITH RULE 49 OF THE FEDERAL RULES OF CIVIL PROCEDURE

A. Claim of Vessel Owner Against Stevedore For Indemnity.

1). Has the vessel owner sustained its burden of proving that the stevedoring company which loaded the steel beams onto the vessel breached its implied warranty of workmanlike performance with respect to that task?

YES X

NO ___

2) If the answer to Question One is Yes, was the stevedore's action the proximate cause of plaintiff's injuries?

YES X

NO ___

B. Claim of Vessel Owner Against Court Carpentry For Indemnification.

1) Has the vessel owner sustained its burden of proving that the plaintiff's employer, Court Carpentry, breached its implied warranty of workmanlike performance by failing to notice and remedy, or cause to be remedied, a dangerous condition?

YES ___

NO X

2) If the answer to Question One is Yes, was the Carpentry Company's failure to notice and remedy, or cause to be remedied, the dangerous condition the proximate cause of plaintiff's injuries?

YES ___

NO ___.

SUMMONS IN A CIVIL ACTION

(Formerly D. C. Form No. 4a Rev. [illegible])

516

1637-181 YFH

United States District Court

FOR THE
SOUTHERN DISTRICT OF NEW YORK

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
80 BROAD STREET NEW YORK
6/7/ 69
ENTERED
P JVC
BY:

CIVIL ACTION FILE NO. 3574

68

JACKSON O. KING,

Plaintiff

v.

DEUTSCHE DAMPFS-GES,

Defendant

SUMMONS IN CIVIL ACTION

Returnable not later than days after service.

Plaintiff's Counsel

Form 9

Jan

SUMMONS

Attorney for Plaintiff

No.

United States District Court
For the Southern District of New York

To the above named Defendant :

You are hereby summoned and required to serve upon SOLOMON J. COHEN, ESQ.

plaintiff's attorney , whose address is 225 Broadway, New York, New York 10007

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint.

JOHN J. OLEAR, JR.

Clerk of Court.

E. Swandiger

Deputy Clerk.

AUG 22 1968

Date: July [illegible], 1968

New York, New York

[Seal of Court]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JACKSON O. KING,

Plaintiff,

- against -

BEUTSCHE DAMPFS-GES,

Defendant.

PLAINTIFF DEMANDS TRIAL BY JURY

----------X

TO THE HONORABLE JUDGES OF THE UNITED STATES:

AS AND FOR A FIRST CAUSE OF ACTION ON BEHALF OF JACKSON O. KING AGAINST BEUTSCHE DAMPFS-GES

The plaintiff complaining against the defendant, BEUTSCHE DAMPFS-GES, alleges as follows:

FIRST: That at all times hereinafter mentioned the plaintiff was and still is a citizen of the State of New York.

SECOND: That the defendant, BEUTSCHE DAMPFS-GES, is now, or during the pendancy of process herein, will be within the jurisdiction of this Honorable Court.

THIRD: That at all times hereinafter mentioned the defendant was and still is a foreign corporation, duly executed under and by virtue of the laws of a foreign state.

FOURTH: That at all times hereinafter mentioned, the defendant was the owner of the vessel, SS TRAUTENFELS.

FIFTH: That at all times hereinafter mentioned, the defendant operated, managed, maintained, controlled, provisioned, manned and supplied the vessel, SS TRAUTENFELS.

SIXTH: That on the 18th day of June, 1968, the plaintiff was an employee of COURT CARPENTRY & MARINE CONTRACTING CO., employed as a lasher, and as such was lawfully aboard the vessel, SS TRAUTENFELS, in the performance of his duties as a lasher.

SEVENTH: That on or about the 18th day of June, 1968, the plaintiff in performance of his duties as a lasher, aboard the said vessel, working under and by authority of the master, owner or agent of the said vessel and the defendant, DEUTSCHE DAMPFS-GES, and was conducting himself in a proper manner, and was not in any way violating the laws or regulations, he was caused to slip and fall in between steel beams that were spaced in a negligent and unseaworthy manner leaving spaces in between the steel beams, causing him to sustain serious and severe personal injuries.

EIGHTH: That the aforesaid occurrence and the resulting injuries to the plaintiff were directly caused by the carelessness, recklessness and negligence of the defendants, their master, officers and crew of the said vessel in failing to provide plaintiff with a safe place to work; in failing to have aboard the vessel adequate crew and officers; in failing to promulgate and endorse proper and safe rules for the performance of the work aboard the said vessel in such a manner as to avoid the occurrence of the aforesaid accident, in permitting and allowing plaintiff to

work under hazardous and dangerous conditions; in failing to warn the plaintiff of the dangers arisen and to be encountered in the performance of his work and in otherwise failing to exercise due care and caution to prevent the happening of the occurrence.

NINTH: That by reason of the aforesaid, plaintiff has been rendered sick, sore, lame and disabled; has suffered and is continuing to suffer great pain; agony and mental anguish for a long time to come; has been and will be prevented from attending to his usual duties or vocation; resulting in a great loss of earnings thereby; has been obliged to undergo hospital and medical care and attention and upon information and belief, the aforesaid injuries may be permanent in character and said loss of earnings may continue indefinitely all to his damage in the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS.

TENTH: All and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

AS AND FOR A SECOND CAUSE OF ACTION ON BEHALF OF JACKSON C. KING AGAINST BEUTSCHE DAMPFS-GES

ELEVENTH: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "FIRST" through "TENTH" inclusive of this complaint with the same force and effect as if set forth at length herein.

TWELFTH: That it was the duty of the defendants, their agents, servants and/or employees to provide the plaintiff with a seaworthy and safe vessel.

appliances, appurtenances and crew and to keep same in a seaworthy condition.

THIRTEENTH: That the aforesaid injuries sustained by the plaintiff were directly caused by the failure of the defendants, their agents, servants and/or employees to provide plaintiff with a safe vessel, appliances, appurtenances and crew and to keep same in a seaworthy condition.

FOURTEENTH: That by reason of the failure of the defendants, their agents, servants and/or employees to provide a seaworthy and safe vessel, appliances, appurtenances and crew, plaintiff has been damaged in the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS.

WHEREFORE, plaintiff demands judgment against the defendant in the First Cause of Action in the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS and judgment in the Second cause of Action for the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS.

Yours, etc.,

SOLOMON J. COHEN, ESQ.
Attorney for Plaintiff
Office & P.O. Address
225 Broadway
New York, New York 10007

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

521

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
89 BROAD STREET NEW YORK
ENTERED
BY: RED 8-8-69
FP

. x

JACKSON O. KING,

Plaintiff,

-against-

BEUTSCHE DAMPFS-GES,

Defendant.

68 Civ. 3374

ANSWER OF DEFENDANT BEUTSCHE DAMPFS-GES

Defendant, above named, by its attorneys, Haight, Gardner, Poor & Havens, answering the complaint of the plaintiff respectfully alleges upon information and belief as follows:

ANSWERING THE FIRST CAUSE OF ACTION:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs First and Sixth of the complaint.

SECOND: Denies each and every allegation contained in paragraphs Second, Seventh, Eighth, Ninth and Tenth of the complaint.

THIRD: Admits that at all times mentioned defendant was and still is a foreign business entity organized and existing under and by virtue of the laws of the Republic of West Germany and except as so specifically admitted denies each and every allegation contained in paragraph Third of the complaint.

FOURTH: Admits the allegations contained in paragraph Fourth of the complaint.

FIFTH: Admits that at all times mentioned defendant operated, managed, maintained, controlled, provisioned, manned and supplied the m/s Trautenfels except for those parts and portions of the vessel, her gear, appurtenances and appliances turned over to steve-

served/m 8-8-69 FP

filed 8-11-69 FP

dores, longshoremen and other independent contractors for whose actions defendant is not responsible and except as so specifically admitted, denies each and every allegation contained in paragraph Fifth of the complaint.

ANSWERING THE SECOND CAUSE OF ACTION:

SIXTH: Repeats and realleges each and every admission, denial and denial of knowledge or information sufficient to form a belief contained in paragraphs First through Fifth of this answer with the same force and effect as if hereinafter fully repeated and set forth at length.

SEVENTH: Admits that it performed each and every duty on its part due and owing to plaintiff and except as so specifically admitted, denies each and every allegation contained in paragraph Twelfth of the complaint.

EIGHTH: Denies each and every allegation contained in paragraphs Thirteenth and Fourteenth of the complaint.

FURTHER ANSWERING THE COMPLAINT AND FOR A FIRST, SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

NINTH: That if plaintiff sustained any injuries as alleged in his complaint the same were caused or contributed to by his own negligence or that of his fellow employees for whose actions defendant is not responsible.

FURTHER ANSWERING THE COMPLAINT AND FOR A SECOND, SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

TENTH: That plaintiff's employment had certain risks incident thereto which were obvious and wellknown to plaintiff at all times of said employment and also when plaintiff first entered upon said employment and said risks were assumed by plaintiff; that whatever injuries plaintiff received in the course of said employment

and which are complained of by plaintiff herein arose from and were caused by said risks, all of which were taken and assumed by plaintiff at the time he entered upon said employment and during the continuance thereof.

WHEREFORE, defendant demands judgment dismissing the complaint of the plaintiff together with the costs and disbursements of this action.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant

By Frank Bayn
A Member of the Firm
80 Broad Street
New York, N. Y., 10004

INTERROGATORIES ADDRESSED TO PLAINTIFF WHICH HE IS REQUIRED TO ANSWER IN WRITING AND UNDER OATH:

1. Give the names and addresses or a description sufficient for identification of all persons present at the time of the accident alleged in the complaint.

2. Give the names and addresses or a description sufficient for identification of all persons known to you or to your attorney who has knowledge of the accident alleged in the complaint.

3. Give the names and addresses or a description sufficient for purposes of identification of all persons from whom you or anyone acting in your behalf has obtained a statement concerning the accident alleged in the complaint stating further which of said statements are oral or written. If written whether signed or unsigned and the present location of each such statement.

4. State whether plaintiff or his attorney has any photographs of the site of the accident alleged in the complaint. If so, state when and by whom the photographs were taken and who has custody of the said photographs.

5. State in what respect or respects it is claimed defendant was negligent as alleged in the complaint.

6. State in what respect or respects it is claimed the m/s Trautenfels (M/V Texas) was unseaworthy as alleged in the complaint.

7. State whether actual or constructive notice of the conditions referred to in the complaint is claimed. If actual notice is claimed, state when, where, to whom and by whom the same was given and what was said at the time. If constructive notice is claimed, state for how long a period of time the conditions referred to in the complaint are alleged to have existed.

8. Describe each and every injury you claim to have sustained as a result of the accident alleged in the complaint, indicating the nature and extent of such injuries and indicating further which of said injuries you claim are permanent.

9. State the period of time you claim, because of the injuries referred to in the complaint, you were:

(a) Disabled;

(b) Confined to your bed;

(c) Confined to your home;

(d) Prevented from working.

10. State from whom, where and when you received medical or surgical treatment for the injuries referred to in the complaint.

11. State by whom, when and where you were given any medical examinations in connection with the injuries referred to in the complaint.

12. Set forth your gross annual earnings for the years 1964 to 1968, inclusive.

13. State how much you claim to have lost in earnings as a result of the injuries alleged in the complaint and for what period of time.

14. Other than lost wages state what other items of special damage you claim.

15. If other items of special damage are claimed, indicate as to each item the date paid, to whom and for what purpose.

16. State whether the accident alleged in the complaint is claimed to have aggravated any pre-existing condition. If so, state the nature of said pre-existing condition, the manner in which it was aggravated and the extent to which it was so aggravated.

Dated: New York, N. Y., August , 1969.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
80 Broad Street
New York, N.Y., 10004

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
80 BROAD STREET NEW YORK
ENTERED

527

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JACKSON O. KING,

Plaintiff,

68 Civ. 3374

- against -

BEUTSCHE DAMPFS-GES,

Defendant.

PLAINTIFF'S ANSWERS TO INTERROGATORIES

----------X

SIRS:

Plaintiff, as and for his answers to the interrogatories propounded by the defendant, states as follows:

1. Grover Perry, address unknown at this time.

2. Unknown at this time.

3. None

4. None

5. Defendant was negligent in allowing an unseaworthy condition to remain in #4 hatch, in not giving the plaintiff a safe place to work, in allowing steel beams which were stowed to have spaces between them, as a result of which plaintiff was caused to sustain serious and severe personal injuries.

6. The SS Trautenfels was unseaworthy in not giving the plaintiff a safe place to work, in not giving the plaintiff any notice or warning of the unseaworthy condition of #4 hatch, in allowing steel beams which were stowed to have spaces between them, as a result of which plaintiff was

7. Constructive notice

8. Plaintiff sustained contusion, sprain with abrasions of medial lateral aspect of left knee. Internal derangement of right knee (with point tenderness over interna and external joint line). Examination shows a brown discolor ation, the size of a quarter at the internal aspect of the knee. There is another brown discoloration, about the size of a dime, at its outer aspect. The left knee is 13-3/8", the right 13-1/8"; left calf 11", right 11-3/8". There is abnormal lateral mobility indicating rupture of the medial and collateral ligament. Crepitus is felt beneath the patell Extension is full but flexion is less by 5%. X-ray of the left knee revealed irregularity and roughening of the posteri inferior surface of the patella. Plaintiff sustained contusio abrasion and sprain of the left knee, with tear of the medial collateral ligaments and now has a chondromalacia of the patella. Plaintiff used crutches for three weeks and used a cane for four weeks. Upon information and belief, the above mentioned injuries are of a permanent and progressive nature.

9. From date of accident to September 13, 1968. He went back to work for two days and incapacitated after that for five weeks due to the accident.

10. Plaintiff received first aid treatment from officer on the ship. Dr. Mario Tagliagambe, 110 President Street, Brooklyn, New York.

11. Dr. David Smith, 1001 Park Avenue, New York, New York, October 21, 1968.

12. Will furnish at a future date

13. Approximately $2,800.00, eighteen week period. He lost approximately $900.00 for intermittent time lost and still continuing to lose time intermittently.

14. Approximately $500.00 in medical expenses.

15. Omit

16. No

Dated: New York, New York
September 11, 1969

Yours, etc.,

SOLOMON J. COHEN
Attorney for Plaintiff
Office & P.O. Address
225 Broadway
New York, New York 10007

TO: HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Defendant
80 Broad Street
New York, New York

530.

STATE OF NEW YORK
COUNTY OF NEW YORK

SOLOMON J. COHEN, being duly sworn, deposes and says that he is the attorney for the plaintiff in the within action and that he has an office at No. 225 Broadway, Borough of Manhattan, City and State of New York; that he has read and knows the contents of the foregoing PLAINTIFF'S ANSWER TO INTERROGATORIES and that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief; and as to those matters he believes it to be true. Deponent further says that the sources of his information and the grounds of his belief as to all the matters therein not stated to be upon his knowledge are as follows:

Investigations which deponent has caused to be made and reports thereon and communications had with the plaintiff in this action.

Deponent further says that the reason why this verification is not made by the plaintiff is that said plaintiff is not presently within the County wherein the deponent has his office.

Sworn to before me this
15th day of September, 1969

Solomon J. Cohen

FLOYD KLAPPER
Notary Public, State of New York
No. 31-7230485
Qualified in New York County
Commission Expires March 30, 1970

53-a

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
80 BROAD STREET NEW YORK
ENTERED
RE 9-16-69
FP
BY:

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

. x

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE DAMPFS-GES,

Defendant.

. x

ORDER

68 Civ. 3374

U.S. District Court
Filed
Sep. 16, 1969
S.D. of N.Y.

Upon the subjoined consent of the attorneys for the respective parties, the annexed affidavit of Thomas F. Molanphy sworn to the 15th day of September, 1969 and the application of Haight, Gardner, Poor & Havens, attorneys for defendant it is,

ORDERED that the application of defendant for an order pursuant to Rule 14 of the Federal Rules of Civil Procedure permitting defendant to make International Terminal Operating Co., Inc. and Court Carpentry & Marine Contracting Co. third-party defendants in this action be and the same is hereby granted.

Dated: New York, N. Y., September 16, 1969.

Marvin E. Frankel
U. S. D. J.

We hereby consent to the entry of the foregoing order.

Dated: New York, N. Y., September 15, 1969.

/s/ Solomon D. Cohen
Attorney for Plaintiff

Haight, Gardner, Poor & Havens
Attorneys for Defendant

Microfilm Sep. 16, 1969

Sub. 9-16-69 FP

Conf. 9-17-69 FP

Served/m confirmed copy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

532

. x

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE DAMPFS-GES,

Defendant.

AFFIDAVIT

68 Civ. 3374

. x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THOMAS F. MOLANPHY being duly sworn deposes and says:

That he is an attorney associated with the firm of Haight, Gardner, Poor & Havens, attorneys for defendant and makes this affidavit in support of defendant's application, consented to by the attorney for plaintiff, for leave to implead International Terminal Operating Co., Inc. and Court Carpentry & Marine Contracting Co. as third-party defendants in this action.

That this action was commenced by plaintiff to recover damages for personal injuries which he allegedly sustained while working as a lasher in the employ of Court Carpentry & Marine Co., Inc. aboard the m/s Trautenfels on June 18, 1968. Essentially, plaintiff claims that while walking along steel beams stowed in the vessel's No. 4 shelter deck his left leg went into a space between two of the beams. Plaintiff's claim of liability, is basically, one of improper stowage.

Upon information and belief the cargo referred to was stowed aboard the vessel by International Terminal

Operating Co., Inc. herein sought to be impleaded as a third-party defendant. Defendant will contend, therefore, that any alleged unseaworthy condition in the stow was the creature of International Terminal Operating Co., Inc. Plaintiff and at least one fellow lasher were allegedly present at the time of plaintiff's accident. Defendant will contend that their knowledge of any unseaworthy condition existing in the hatch is imputed to their employer and their failure to take proper precautions could render the employer liable in indemnity.

Under the circumstances outlined above, deponent respectfully submits that the granting of the present application would best serve the interests of justice and the expeditious processing of this litigation.

No application for the same or similar relief has previously been made.

WHEREFORE, deponent prays that an order be entered herein in the annexed form granting defendant's application to implead International Terminal Operating Co., Inc. and Court Carpentry & Marine Contracting Co. as third-party defendants in the action and granting to defendant such other further and different relief as to the Court may seem just.

s/ Thomas F. Molanphy
Thomas F. Molanphy

Sworn to before me this
15th day of September, 1969.

Notary Public

MARGUERITE F. ZAMBITO
Notary Public, State of New York
No. 60-0700310
Qualified in Westchester County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1970

United States District Court

FOR THE

534a

SOUTHERN DISTRICT OF NEW YORK

68 CIVIL ACTION FILE NO. 3374

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
60 BROAD STREET NEW YORK
ENTERED
10-2-69
FP

JACKSON O. KING,

Plaintiff
v.

BEUTSCHE DAMPFS-GES,
Defendant and Third-Party Plaintiff

INTERNATIONAL TERMINAL OPERATING CO., INC., AND COURT CARPENTRY & MARINE CONTRACTING CO.,
Third-Party Defendants

THIRD-PARTY

SUMMONS

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon

SOLOMON J. COHEN, ESQ.

plaintiff's attorney, whose address is 225 Broadway
New York, N. Y., 10007

and upon HAIGHT, GARDNER, POOR & HAVENS

who is attorney for the above-named defendant and third-party plaintiff, and whose address is

80 Broad Street
New York, N. Y., 10004

an answer to the third-party complaint which is herewith served upon you within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

John Lo Forte
Clerk of the Court.

By [illegible]
Deputy Clerk.

Dated: New York, N. Y., October 2, 1969. [Seal of Court]

f. 69
Marshal Service
3rd party papers
Served on
pltf's atty
10-3-69
FP

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

535

. x

JACKSON O. KING,

Plaintiff,

-against-

BEUTSCHE DAMPFS-GES,

Defendant and
Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC., AND COURT CARPENTRY & MARINE CONTRACTING CO.,

Third-Party Defendants.

. x

THIRD-PARTY COMPLAINT

68 Civ. 3374

Defendant and third-party plaintiff above named, by its attorneys, Haight, Gardner, Poor & Havens, complaining of the third-party defendants, respectfully alleges upon information and belief as follows:

FIRST: That at all times hereinafter mentioned defendant and third-party plaintiff was and still is a foreign business entity organized and existing under and by virtue of the laws of the Republic of West Germany and the owner of the M/s Trautenfels.

SECOND: That at all times hereinafter mentioned third-party defendant, International Terminal Operating Co., Inc. was and still is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

THIRD: That at all times hereinafter mentioned third-party defendant, Court Carpentry & Marine Contracting Co. was and still is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

FOURTH: That on or about August 22, 1968 an action was commenced by plaintiff in the United States District Court for the Southern District of New York to recover damages for personal injuries allegedly sustained by him while working as a lasher in the employ of third-party defendant, Court Carpentry & Marine Contracting Co., aboard the m/s Trautenfels on June 18, 1968. A copy of the complaint is annexed hereto.

FIFTH: That the complaint of the plaintiff alleges, among other things, that because of the negligence of defendant and third-party plaintiff and the unseaworthiness of the m/s Trautenfels he was caused to sustain severe and permanent injuries.

SIXTH: That at the time of the happening of the events alleged in the complaint and for some time prior thereto third-party defendant, International Terminal Operating Co., Inc., was engaged, pursuant to an agreement, in the performance of certain stevedoring operations aboard the m/s Trautenfels.

SEVENTH: That at the time of the happening of the events alleged in the complaint third-party defendant, Court Carpentry & Marine Contracting Co., was engaged, pursuant to an agreement, in the performance of certain lashing and related work aboard the m/s Trautenfels and for that purpose employed, among others, the plaintiff herein.

EIGHTH: That if plaintiff sustained any injuries as alleged in his complaint the same are improperly alleged as due to the negligence of defendant and third-party plaintiff but were actually caused or contributed to in whole or in part by either or both of third-

party defendants in breach of their respective warranties of workmanlike service.

NINTH: That if plaintiff sustained any injuries as a result of any unseaworthy condition aboard the m/s Trautenfels, the existence of which is hereby denied, said unseaworthy condition was caused, created and/or permitted to exist by either or both third-party defendants in breach of their respective warranties of workmanlike service.

TENTH: That if plaintiff should be entitled to recover against defendant and third-party plaintiff because of the matters alleged in the complaint then defendant and third-party plaintiff should have recovery over against and be indemnified by either or both third-party defendants for all such sums so recovered.

WHEREFORE, defendant and third-party plaintiff demands judgment against third-party defendants for all sums, if any, which may be awarded to plaintiff in this action together with reasonable counsel fees, the costs and disbursements of defending this action.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third-Party Plaintiff

By William P. Kane Jr.
A Member of the Firm
80 Broad Street
New York, N. Y., 10004

cg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JACKSON O. KING,

Plaintiff

-against-

BEUTSCHE DAMPFS-GES,

Defendant and
Third Party Plaintiff

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC. AND COURT CARPENTRY & MARINE CONTRACTING CO.,

Third Party Defendants

----------x

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
80 BROAD STREET NEW YORK
ENTERED
BY:

68 Civ. 3374

ANSWER TO COMPLAINT OF DEFENDANT AND THIRD PARTY PLAINTIFF

THIRD PARTY DEFENDANT INTERNATIONAL TERMINAL OPERATING CO. INC. DEMANDS TRIAL BY JURY

INTERNATIONAL TERMINAL OPERATING CO. INC., one of the third party defendants above named, appearing by FOGARTY and NIELSEN, its attorneys, as and for its separate answer to the third party complaint of the defendant and third party plaintiff herein:

FIRST: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs designated "FIRST" and "THIRD" of the third party complaint.

SECOND: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph designated "FOURTH" of the third party complaint but admits a copy of the complaint is annexed hereto.

THIRD: Denies upon information and belief each and every allegation contained in paragraph designated "SIXTH" of the third party complaint except admits INTERNATIONAL TERMINAL

OPERATING CO., INC., was engaged, pursuant to an agreement, in the performance of certain stevedoring operations aboard the m/s Trautenfels.

FOURTH: Denies upon information and belief each and every allegation contained in paragraphs designated "EIGHTH", "NINTH" and "TENTH" of the third party complaint.

AS AND FOR A SEPARATE AND COMPLETE DEFENSE TO THE THIRD PARTY COMPLAINT OF THE DEFENDANT AND THIRD PARTY PLAINTIFF HEREIN, THIRD PARTY DEFENDANT INTERNATIONAL TERMINAL OPERATING CO. INC. ALLEGES UPON INFORMATION AND BELIEF:

FIFTH: That whatever injuries third party plaintiff may have sustained at the time and place alleged in the third party complaint were caused in whole or in part or were contributed to by the negligence, fault and want of care on the part of the third party plaintiff.

WHEREFORE, third party defendant, INTERNATIONAL TERMINAL OPERATING CO. INC., demands judgment dismissing the third party complaint of the defendant and third party plaintiff herein, together with the costs and disbursements of this action.

FOGARTY and NIELSEN
Attorneys for Third Party
Defendant INTERNATIONAL TERMINAL
OPERATING CO. INC.
Office & P.O. Address
10 Rockefeller Plaza
New York, New York 10020

By: Tidal B. Henry, Jr.
TIDAL B. HENRY, JR.
A Member of the Firm

UNITED STATES DISTRICT COURT 540

SOUTHERN DISTRICT OF NEW YORK

FILE COPY
WRIGHT, GARDNER, POOR & HAVENS
80 BROAD STREET NEW YORK
ENTERED

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE-DAMPFS-GES,

Defendant and
Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC. AND COURT CARPENTRY & MARINE CONTRACTING CO.,

Third-Party Defendants.

68 Civ. 3374

ANSWER TO THIRD-PARTY COMPLAINT AND COUNTERCLAIMS.

Third-party defendant, Court Carpentry & Marine Contracting Co., for its answer to the third-party complaint respectfully alleges upon information and belief as follows:

FIRST: Denies any knowledge or information sufficient to form a belief as to paragraphs first and sixth of the third-party complaint.

SECOND: Denies the allegations in respect to Court Carpentry & Marine Contracting Co., contained in paragraphs 8th, 9th and 10th.

AS AND FOR A COUNTERCLAIM AGAINST THE PLAINTIFF HEREIN, THE THIRD-PARTY DEFENDANT, COURT CARPENTRY & MARINE CONTRACTING CO., FURTHER ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

1. That on June 18, 1968 the plaintiff was a longshoreman in the employ of the third-party defendant, COUrt Carpentry and Marine Contracting Co., herein working aboard the M/S Trautenfels.

2. That on said date while the plaintiff was working aboard the said vessel as an employee of the third-party defendant, Court Carpentry and Marine Contracting Co., herein, the plaintiff knew or should have known of all conditions prevailing in the area of the said vessel where he was at work.

3. That while working aboard the said vessel on said date as an employee of the third-party defendant Court Carpentry and Marine Contracting Co., herein, the plaintiff had certain job duties amongst which was the duty of performing the services by him to be performed in a safe, proper and workmanlike manner, and to so conduct himself in the performance of the services by him to be pefformed so as not to cast his employer, the third-party defendant, Court Carpentry and Marine Contracting Co., herein into liability with any third party.

4. That if the third-party defendant, Court Carpentry and Marine Contracting Co, be adjudged liable herein to indemnify the defendant-third party plaintiff, such liability will have been brought about, caused or contributed to by the negligence and fault of the plaintiff herein by reason of the said plaintiff having failed to perform his work and job duties in a safe, proper and workmanlike manner, and by the active, affirmative, principal and

primary fault of the plaintiff herein, and by the plaintiff's breach of both the express and implied terms of his contract of employment with the third-party defendant, Court Carpentry and Marine Contracting Co., herein.

5. That by reason of the foregoing, if the third-party defendant, Court Carpentry and Marine Contracting Co. should herein be adjudged liable to indemnify the defendant-third-party plaintiff, the said third-party defendant, Court Carpentry and Marine Contracting Co., is entitled to recover full indemnity from the plaintiff herein, together with the costs and disbursements of this action, including a reasonable amount for attorneys' fees.

AS AND FOR A COUNTERCLAIM AGAINST THE DEFENDANT-THIRD-PARTY PLAINTIFF, THE THIRD-PARTY DEFENDANT, COURT CARPENTRY AND MARINE CONTRACTING CO. FURTHER ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

6. That if the third-party defendant, Court Carpentry and Marine Contracting Co. be adjudged liable herein to the third-party plaintiff, such liability being expressly denied, such liability will have been brought about and caused, in whole or in part, by the active and affirmative negligence and fault of the third-party plaintiff and by the breach by said third-party plaintiff of both the express and implied terms of its contract with the third-party defendant, Court Carpentry and Marine Contracting Co. and also by the breach by the third-party plaintiff of the warranty of seaworthiness which it owed to the third-party defendant, Court Carpentry and Marine Contracting Co. and that by reason of the foregoing, the said third-party plaintiff is obligated to indemnify the third-party defendant, Court Carpentry and Marine Contracting Co. for an amount equal to the extent that any liability on the part of the third-party

defendant, Court Carpentry and Marine Contracting Co., was caused, brought about or contributed to by the said third-party plaintiff, together with the costs and disbursements of this action, including a reasonable amount for counsel fees.

AS AND FOR A COUNTERCLAIM AGAINST THE THIRD-PARTY DEFENDANT, INTERNATIONAL TERMINAL OPERATING CO. INC., COURT CARPENTRY AND MARINE CONTRACTING CO. ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

7. That if the third-party defendant, Court Carpentry and Marine Contracting Co. be adjudged liable herein to the third-party plaintiff, such liability being expressly denied, such liability will have been brought about and caused in whole or in part by the active and affirmative negligence of and fault of the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO. INC., and it is obligated to indemnify the third-party defendant, Court Carpentry and Marine Contracting Co. for an amount equal to the extent that any liability on the part of the third-party defendant, Court Carpentry and Marine Contracting Co. was caused, brought about or contributed by the said third-party defendant, INTERNATIONAL TERMINAL OPERATING CO. INC. together with the costs and disbursements of this action including a reasonable amount for counsel fees.

WHEREFORE, third-party defendant, Court Carpentry and Marine Contracting Co. demands judgment dismissing the third-party complaint herein, together with the costs, disbursements of this action and the legal fees and expenses incurred by it in defense of this action, or in the event that the third-party defendant, Court Carpentry and Marine Contracting Co. be adjudged liable to any party herein, the third-party defendant, Court Carpentry and Marine Contracting Co. then demands judgment over and against the third-party

plaintiff, the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO. INC. and the plaintiff, or any of them, for the full amount of any judgment which may be rendered against it, together with expenses and legal fees, and the costs and disbursements of this action.

Dated: New York, N.Y.

SIDNEY A. SCHWARTZ

Member of the Firm
of
ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third-Party Defendant
Court Carpentry and Marine
Contracting Co.
801 Second Avenue
New York, New y York 10017

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE-DAMPFS-GES,

Defendant and Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO. INC. an COURT CARPENTRY & MARINE CONTRACTING CO.,

Third-Party Defendants.

INTERROGATORIES

68 Civ. 3374

INTERROGATORIES PROPOUNDED BY THE THIRD-PARTY DEFENDANT, COURT CARPENTRY AND MARINE CONTRACTING CO. TO THE THIRD-PARTY PLAINTIFF, AND TO BE ANSWERED BY THE LATTER IN WRITING, UNDER OATH, WITHIN FIFTEEN DAYS FROM THE DATE OF SERVICE. THESE ARE CONTINUING INTERROGATORIES AND SUPPLEMENTAL ANSWERS THERETO UP TO THE TIME OF TRIAL ARE REQUIRED.

1. State whether the third-party plaintiff or any person acting in its behalf has interviewed any person or persons in connection with this action; and if so, state further (a) the name and last known address of each person interviewed, (b) the date of each such interview, (c) whether any report of such interview was made, and if so (d) the present location of such reports.

2. State whether the third-party plaintiff, or anyone acting in its behalf, has obtained any statements in

connection with this action; and if so, state further (a) the name and last known address of each person from whom a statement has been obtained, (b) the date or dates that each such statement was obtained, (c) whether each such statement was oral or in writing, (d) whether each of the written statements was signed, and (e) the present location of all such written statements, whether the same were signed or not.

3. State the specific source or sources of all your knowledge, information and/or beliefs respecting the matters alleged in paragraphs **8th and 9th** of the third-party complaint. If such source or sources be a person or persons, then set forth the name and last known address of each such person; if such source be records, papers, documents or reports, then set forth a full and complete description of each such item together with its present location or whereabouts.

4. State whether there were any detentions on the **M/S Trautenfels** and if so, state further (a) the time that each such detention began and terminated, (b) the cause or reason for each such detention, (c) the action taken to rectify each such detention, and (d) the present location of any records relating to such detentions.

5. State whether the third-party plaintiff, its agents or representatives, have in their possession or control any records, documents, reports, or photographs relating to the happening of the accident alleged in the

plaintiff's complaint and the circumstances surrounding the same; and if so, identify each such record, document, report, or photograph and state the present location or whereabouts of each such item.

6. State the names and last known addresses of each and every person known to or believed by the third-party plaintiff, its agents or representatives, to have knowledge respecting the accident alleged in the plaintiff's complaint and the circumstances surrounding the same.

7. State with particularity each and every act and/or omission to act on the part of the third-party defendant, its agents, servants and/or employees, by reason of which it is claimed that the third-party defendant is liable to indemnify the third-party plaintiff herein.

Dated: New York, N.Y.
June 1970

SIDNEY A. SCHWARTZ

Member of the Firm
of
Alexander, Ash, Schwartz & Cohen
Attorneys for Third-Party defendants
Court Carpentry and Marine Contracting Co.
801 Second Avenue
New York, N.Y. 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE-DAMPFS-GES,

Defendant and
Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO. INC. AND COURT CARPENTRY & MARINE CONTRACTING CO.

Third-Party Defendants

NOTICE OF TAKING DEPOSITION

----------x

S I R S:

PLEASE TAKE NOTICE that the testimony of the plaintiff, Jackson O. King and defendant and third-party plaintiff Deutsche-Dampfs-Ges by Chief Officer of the M/C Traumfels on June 18, 1968 and third-party defendant International Operating Co. Inc. by its #4 hatch boss on June 18, 1968, will be taken by deposition pursuant to Rule 26, et seq., of the Rules of Civil Procedure for the District Courts of the United States before Dorothy Schon, a notary public, or some other officer authorized to take depositions, at the office of the undersigned, 801 Second Avenue, Borough of Manhattan, City of New York, Room 304, on the 19th day of June 1970 at 2 P.M. or on a lawfully adjourned date, and from day to day thereafter until the examination is concluded, at which times and place you are hereby notified to attend and propound interrogatories to the witnesses if you think fit.

Dated: New York, New York

SIDNEY A. SCHWARTZ

Member of Firm
of
ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for
Third-party defendant, Court Carpentry
and Marine Contracting Co.
801 Second Avenue
New York, New York 10017

550

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
80 BROAD STREET NEW YORK
ENTERED
BY:

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE DAMPFS-GES,

68 Civ. 3374

Defendant and
Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC. and COURT CARPENTRY & MARINE CONTRACTING CO.,

Third-Party Defendants.

INTERROGATORIES ADDRESSED TO THIRD-PARTY DEFENDANT, INTERNATIONAL TERMINAL OPERATING CO., INC., WHICH THE LATTER IS REQUIRED TO ANSWER IN WRITING AND UNDER OATH:

SERVED
5/20/70
FILED
5-21-70
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1. Give the names and addresses or a description sufficient for purposes of identification of all persons present at the time and place of the accident alleged in the complaint of the plaintiff.

2. Give the names and addresses or a description sufficient for purposes of identification of all persons known to you or to your attorney to have knowledge of the accident alleged in the complaint.

3. Give the names and addresses or a description sufficient for purposes of identification of all persons from whom you or anyone acting on your behalf has obtained a statement concerning the accident alleged

in the complaint stating further which of said statements are oral or written, if written whether signed or unsigned, the dates on which such statements were obtained and the present location of each such statement.

4. State whether third-party defendant, International Terminal Operating Co., Inc., performed stevedoring operations in the No. 4 hatch of the m/s Trautenfels on:

(a) June 17, 1968

(b) June 18, 1968.

5. If your answer to interrogatory 4(a) or 4(b), or both, is in the affirmative, then state:

(a) The hours between which such operations were performed on each date.

(b) The deck level and/or levels on which such operations were performed.

(c) The nature of such operations, whether loading or unloading.

(d) The kind of cargo handled.

6. State whether third-party defendant, International Terminal Operating Co., Inc., loaded steel beams in the upper 'tween deck of hatch No. 4 of the m/s Trautenfels on either June 17 or June 18, 1968.

7. If your answer to the foregoing interrogatory is in the affirmative state:

(a) The date on which the said beams were loaded.

(b) The hours between which the said beams were loaded.

(c) A general description of the beams, giving approximate length, height and width.

(d) The number of beams loaded.

(e) The portion of the deck in which

the beams were loaded-portside, starboard side and/or center.

(f) The name and address of the hatch boss in the longshore gang which loaded the said beams.

8. State whether it was reported the third-party defendant, International Terminal Operating Co., Inc., that plaintiff had sustained an injury aboard the m/s Trautenfels on June 18, 1968.

9. If your answer to the foregoing interrogatory is in the affirmative state:

(a) When the accident was reported.

(b) By whom and to whom the accident was reported.

(c) Whether third-party defendant, International Terminal Operating Co., Inc., made a written report of the said accident.

10. State in what respect or respects it is claimed that the defendant and third-party plaintiff was negligent as alleged in paragraph Fifth of the answer of third-party defendant, International Terminal Operating Co., Inc.

Dated: New York, New York,
May , 1970.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third-Party Plaintiff
80 Broad Street
New York, New York 10004

553.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JACKSON O. KING

Plaintiff

-against-

DEUTSCHE DAMPFS-GES.

Defendant and Third Party Plaintiff

-against-

INTERNATIONAL TERMINAL OPERATING CO. INC. and COURT CARPENTRY & MARINE CONTRACTING CO.

Third Party Defendants

----------X

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
90 BROAD STREET NEW YORK
BY: E 1/13/71

68 Civ. 3374

ANSWER TO INTERROGATORIES

INTERNATIONAL TERMINAL OPERATING CO. INC., one of the third party defendants, by FOGARTY and NIELSEN, its attorneys, answering the interrogatories of third party plaintiff herein:

1. Grover perry, 547 Chestnut Street, Brooklyn, N.Y.

2. Andrew Auletti, 1697 East 93rd Street, Brooklyn, N.Y.
Thomas Genovese, 1027 85th St., Brooklyn, N.Y.

3. Written signed statements in our file 1 Hoyt Street, Brooklyn, N.Y.:

Andrew Auletti, obtained 8/1/68
Grover Perry, obtained 7/30/68
Robert Pinto (hatch boss), 69 Woodhull St., Brooklyn, N.Y., obtained 7/24/68.
Oral statements in our file 1 Hoyt Street, Brooklyn, New York :

Jackson O. King, obtained 7/10/68
Thomas Genovese, obtained 7/30/68

4. Yes, on June 18, 1968.

5. (a) 8 A.M. - 11 A.M.
(b) #4 hatch shelter deck
(c) loading
(d) steel I beams

6. Yes.

7. (a) June 18, 1968
   (b) 8 A.M. - 11 A.M.
   (c) 14' x 24' x 60'
   (d) unknown
   (e) stored fore and aft with exception of space in center of hatch for access to ladder
   (f) Robert Pinto

8. Not reported

9. Not reported

10. Failure of supervision, inspection, control of operation and same after completion of loading operation to report the alleged defect in spacing to the stevedore, failure to provide a safe place to work.

Dated: New York, N.Y.
January 11, 1971

FOGARTY and NIELSEN
Attorneys for Third Party
Defendant, INTERNATIONAL
TERMINAL OPERATING CO. INC.
Office & P.O.Address
10 Rockefeller Plaza
New York, N.Y. 10020

By: John P. McCambridge
JOHN P. McCAMBRIDGE
A Member of the Firm

1637-181
3447 - Gen Tem

555

OPINION OF JUDGE MOTLEY
DATED JUNE 18, 1974

FILE COPY
WAIGHT, GARDNER, REED & KNOX
ONE STATE STREET PLAZA
ENTERED
FILED 6-18-74
BY:

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
JUN 18 9 11 AM '74

#40829

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACKSON O. KING,

Plaintiff,

-v-

DEUTSCHE-DAMPFS-GES.,

Defendant and
Third-Party Plaintiff,

-v-

INTERNATIONAL TERMINAL OPERATING CO., INC., and COURT CARPENTRY & MARINE CONTRACTING CO.,

Third-Party Defendants.

68 CIV. 3374

APPEARANCES

SERGI and FETELL
44 Court Street
Brooklyn, New York 11201

SOLOMON J. COHEN
225 Broadway
New York, New York 10007

Attorneys for Plaintiff

HAIGHT, GARDNER, POOR & HAVENS
By Thomas F. Molarphy
One State Street Plaza
New York, New York 10004

Attorneys for Defendant and
Third-Party Plaintiff

CONSTANCE BAKER MOTLEY, D. J.

Memorandum Opinion and Order

Plaintiff, a marine carpenter, brought this diversity action against defendant shipowner on negligence and unseaworthiness theories. The case was tried to a jury on October 31 and November 1, 1973 and the jury, in accordance with its special verdict (Court's Exhibit 1), found that plaintiff had sustained damages in the amount of $30,000. The jury reduced those damages by 50%, for contributory negligence, and awarded plaintiff $15,000. 1/

Plaintiff moves under Rule 59 (e), Fed. R. Civ. P., to set aside that portion of the jury's verdict finding him contributorily negligent and, accordingly, to amend the judgment to award him $30,000.

Defendant moves under Rule 50, for judgment in its favor notwithstanding the verdict. In the alternative it moves under Rule 59 for a new trial on the issue of negligence.

Plaintiff claimed on the trial that, on June 18, 1968, while in the employ of Court Carpentry and Marine Contracting Co., he was working aboard the defendant's vessel as a marine carpenter or lasher. Plaintiff's employer had been hired by defendant to do carpentry work. A stevedoring company, International Terminal Operating Company (ITO) had been employed by the vessel owner to stow steel beams on the 'tween deck of the vessel.

It was plaintiff's job to tie or lash other cargo which had been stowed on the steel beams by ITO to those steel beams.

There was no dispute that plaintiff was required to walk on the beams in order to perform this task.

Plaintiff sought to recover damages which he allegedly sustained to his left knee when he stipped into a space which had been left between the beams. He claimed that the manner in which the beams were stowed, that is, the leaving of a space wide enough for a foot to go through, rendered the vessel unfit. Plaintiff further claimed that the vessel owner was liable for the negligent acts of the stevedoring company and plaintiff's

employer, the carpentry company, and, in the alternative, that the vessel owner negligently failed to carefully inspect the stevedore's work.

Defendant, on the other hand, contended that plaintiff was contributorily negligent by failing to watch where he was walking.

The jury found that defendant was negligent, that its negligence was the proximate cause of the accident and that plaintiff was contributorily negligent. The jury, however, found that plaintiff had not sustained his burden of proving that the vessel was unseaworthy.

Defendant now moves for judgment n.o.v., or, in the alternative, for a new trial on the grounds that 1) plaintiff was not entitled to a charge under the Jones Act, as he was not a member of the crew or an employee of the defendant, 2) there was insufficient evidence of negligence on the part of the vessel owner, and 3) the jury should not have been instructed that the vessel owner could be held liable for the negligent acts of the stevedore and carpentry companies.

Negligence

The court agrees with defendant's contention that plaintiff was not entitled to recover under the Jones Act. The

Jones Act applies only between employers and employees and there was no showing that the vessel owner was an employer for purposes of the Jones Act. Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165 (2d Cir. 1973).

However, since this is a diversity action, New York law governs and an employment relationship is obviously not required under state negligence law. Since, apart from the requirement of an employment relationship, the standards for finding liability under common law negligence are essentially the same as those which the court described in its Jones Act charge, cf. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), defendant was not prejudiced.

The court, however, must conclude that there was insufficient evidence to support the jury's finding that the vessel owner was negligent. A shipowner is negligent only if its agents had actual or constructive notice of a dangerous condition. Rice v. Atlantic Gulf & Pacific Co., ___ F.2d ___, Docket No. 73-1151 (2d Cir., October 9, 1973). In the instant case, there was no evidence that members of the ship's crew knew of the dangerous condition or that the condition had been present long enough that the crew could be charged with notice.[2/] Moreover, plaintiff, himself, testified, in connection with the contributory negligence defense, that he did not see the space until he actually stepped

into it. (Tr., Oct. 31, 1973, p. 41.)[3/] Therefore, the jury did not have sufficient evidence from which it could conclude that the allegedly dangerous condition was present long enough or was obvious enough that the ship's crew should have noticed it.

The jury's finding may have been based on a belief that the defendant shipowner had an affirmative duty to inspect the work of the stevedore before permitting the longshoremen to work in the cargo area and that such an inspection would have resulted in the discovery of the allegedly dangerous condition. This was one of plaintiff's theories (Tr., Nov. 1, 1973, p. 154) and the court so informed the jury in its charge. However, there is no such duty on the part of the shipowner to inspect the stevedore's work, at least unless the shipowner should know that there is a dangerous condition which ought to be corrected.

Defendant also challenges the court's instruction with regard to defendant's liability for negligent acts of the stevedore. The court charged the jury as follows:

> "In this case there is no dispute that the vessel-owner here had employed two agents to work aboard the ship, that is the stevedoring company and the plaintiff's employer, the Carpentry Company.

> The vessel-owner in this case is responsible for the negligence of any of its agents or employees committed in the scope of their employment." (Tr., Nov. 1, 1973, p. 224.)

The charge was erroneous. The shipowner is not responsible for the negligence of longshoremen unless such negligence created an unseaworthy condition. Spano v. Kroninklijke Rotterdamsche Lloyd, 472 F.2d 33, 35 (2d Cir. 1973). The court assumes that if the stevedore's negligence did produce an unseaworthy condition, the shipowner would still not be liable in negligence, although the vessel would, of course, be liable for unseaworthiness.

The jury may have assumed that, either the stevedore or the carpentry company must have had knowledge of the open space and, therefore, was negligent, and that defendant shipowner would be held responsible for this negligence.

Unseaworthiness

As already noted, the jury found for plaintiff on the issue of negligence but found for defendant on the issue of unseaworthiness. Although plaintiff moved for a directed verdict on the issue of unseaworthiness at the close of defendant's case, he has not moved for a judgment notwithstanding the verdict on

that issue.

However, the court has decided, on its own motion, after having given the parties notice and an opportunity to be heard, Rule 59(d), Fed. R. Civ. P., that a new trial should be ordered on unseaworthiness.

While the court cannot conclude that the jury was required to find unseaworthiness or that its finding was against the weight of the evidence, "[i]t is hard to imagine, especially on the facts of this case, how an owner could be negligent if the ship was not unseaworthy. . . ." Spano, supra, 472 U.S. at 35 n. 1.

Although juries are ordinarily permitted to return inconsistent verdicts, it seems likely in this case that the jury, having found defendant liable for negligence, concluded that it was not necessary to find defendant liable for the unseaworthiness of its vessel, or even to consider the issue at all, in order to afford plaintiff the recovery to which it concluded he was entitled.

Since it is likely that plaintiff's unseaworthiness claim never received a full hearing, the court concludes that there should be a new trial on his unseaworthiness claim.

Unless the parties waive their right to a jury trial in writing no later than June 26, 1974, the unseaworthiness claim

will be tried to a jury. 4/ In the event that a jury trial is waived, the Court will receive the unknown witness and damages issues on the basis of the record of the previous trial. The parties would, however, be afforded an opportunity to offer additional, relevant evidence.

In view of the Court's disposition of the negligence claim, plaintiff's motion to set aside the finding of contributory negligence is denied.

Dated: New York, New York

June 16, 1974

SO ORDERED

CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTES

1. The third party action by the vessel owner against the stevedore and carpentry company, plaintiff's employer, was severed.

2. Indeed, Bob Pinto, the hatch foreman employed by the stevedore, International Terminal Operating Co., testified on his deposition that he believed the stowage of the beams had been completed shortly after 11:00 A.M. (Def's Exh. C, p. 16.) According to plaintiff's deposition, the accident likewise occurred at approximately 11:00 A.M. (Def's Exh. A, p. 12.)

3. See also testimony of Grover Perry, transcript, Oct. 31, 1973, p. 106.

4. Both the negligence and unseaworthiness claims, which arise under New York law, were brought on the "law" side of the court.

1637-181
JME GWP TFM

565

OPINION OF JUDGE MOTLEY
DATED AUGUST 24, 1974

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA NEW YORK
8/24/74
ENTERED
BY: RE WMJ

The within motion to consolidate is granted and the case is hereby set for trial on Wednesday October 9, 1974 at 10:00 a.m.

Motion Granted
8/23/74 Lawrence McKay
U.S.D.J.

PLEASE TAKE NOTICE that
which the within is a copy, will be presented for settlement and signature to the
of this Court at
on the
day of
M.

rough of
ty of New York, on the
, 19 , at
ated, New York,
19

Yours &c.,
HAIGHT, GARDNER, POOR & HAVENS
Office and Post Office Address:
One State Street Plaza,
Borough of Manhattan,
New York, N. Y. 10004

for

for

U.S. DISTRICT COURT
FILED
AUG 23 1974
S. D. OF N. Y.

KINSE
v.
Deutsche Dampfs-ges
v.
Int'l Terminal

JAMES M. ESTABROOK
THOMAS F. MOLANPHY
JAMES M. HAZEN
Of Counsel

HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA
NEW YORK, N. Y. 10004
Digby 4-6800
Attorneys for Defendant
and Third Party Plaintiff

1687-181

MOTLEY, J.

566

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

. x

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE DAMPFS-GES,

Defendant and Third Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC. and COURT CARPENTRY & MARINE CONTRACTING CO.,

Third Party Defendants.

. x

U.S. DISTRICT COURT FILED AUG 8 - 1974 S.D. OF N.Y.

NOTICE OF MOTION TO CONSOLIDATE

68 Civ. 3374 (CBM)

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA, NEW YORK
8/24/74
ENTERED
BY:

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Thomas F. Molanphy, sworn to the 7th day of August 1974, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Constance Baker Motley in Room 906 of the United States Courthouse, Foley Square, City, County and State of New York on the 21st day of August 1974 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard for an order pursuant to Rule 42 (a) of the Federal Rules of Civil Procedure consolidating for all purposes including trial the case of Jackson O. King, plaintiff, against Deutsche Dampfs-Ges, defendant, and the case of Deutsche Dampfs-Ges against International Terminal Operating Co., Inc. and

567.

Served/Filed 10/21/74

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

. x

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE-DAMPFS-GES,

Defendant and Third Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC., and COURT CARPENTRY & MARINE CONTRACTING CO.,

Third-Party Defendants.

. x

FILED
WRIGHT, GORDON, ZACHRY & BUTTS
ONE CHASE MANHATTAN PLAZA NEW YORK
21 October 74
ENTERED
R.C.D.
BY:

NOTICE OF MOTION

68 Civ. 3374 (CBM)

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of THOMAS F. MOLANPHY, sworn to the 21st day of October, 1974, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this court before the Honorable Constance Baker Motley in Room of the United States Courthouse, Foley Square, City, State and County of New York on the 5th day of November, 1974, for an order pursuant to Rule 50 of the Federal Rules of Civil Procedure granting to defendant and third-party plaintiff judgment in its favor notwithstanding the jury verdict on the issues of seaworthiness and third-party defendant Court Carpentry's breach of its warranty of workmanlike performance and for such other, further and different relief as to this Court may seem just and proper.

Dated: New York, New York

October 21, 1974

Yours, etc.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
and Third-Party Plaintiff

By Thomas F. McLaughlin
A Member of the Firm
One State Street Plaza
New York, New York 10004

TO:

SOLOMON J. COHEN, ESQ.
Attorney for Plaintiff
225 Broadway
New York, New York

FOGARTY, McLAUGHLIN and SEMEL, ESQS.
Attorneys for Third-Party Defendant
International Terminal Operating
Co., Inc.
10 Rockefeller Plaza
New York, New York 10020

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third-Party Defendant
Court Carpentry & Marine Contracting Co.
801 Second Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

. x

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE -DAMPFS-GES,

Defendant and Third Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC., and COURT CARPENTRY & MARINE CONTRACTING CO.,

Third-Party Defendants.

. x

AFFIDAVIT

68 Civ. 3374 (CBM)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THOMAS F. MOLANPHY, being duly sworn deposes and says as follows:

1. That he is a member of the firm of Haight, Gardner, Poor & Havens, attorneys for defendant and third-party plaintiff herein, that he is fully familiar with all the pleadings and proceedings heretofore had herein and makes this affidavit in support of defendant's motion for judgment notwithstanding the jury verdict on the issues of unseaworthiness and third-party defendant Court Carpentry's liability to indemnify third-party plaintiff.

2. This was an action by plaintiff to recover damages for personal injuries which he claims to have

sustained on June 18, 1968, while working as a lasher in the employ of Court Carpentry and Marine Contracting Co. aboard the M/S TRAUTENFELS, a vessel owned by defendant and third-party plaintiff. It was plaintiff's claim that he was injured because of cargo improperly stowed by International Terminal Operating Co., Inc., an independent stevedoring contractor. Accordingly, both plaintiff's employer, Court Carpentry & Marine Contracting Co., Inc. and International Terminal Operating Co., Inc. were impleaded as third-party defendants.

3. On October 31, 1973, this Honorable Court presided over a jury trial of this case between the plaintiff and defendant. Third-party plaintiff's actions against International Terminal Operating Co., Inc. and Court Carpentry & Marine Contracting Co. were severed.

4. Following the severance for separate trials of the indemnity actions against both third-party defendants, the main action of the plaintiff against the vessel owner proceeded to trial before this Court with a jury on October 31, 1973. The following day the trial jury, at the conclusion of the case, returned a verdict in plaintiff's favor in the amount of $15,000. In answers to special interrogatories submitted by the court the jury indicated that they found defendant negligent, but that the vessel was not unseaworthy. The jury also found plaintiff guilty of 50% contributory negligence.

5. After post-trial motions by the plaintiff and defendant, this court by its memorandum opinion and order of June 18, 1974, granted judgment n.o.v. for the

defendant on the ground that there was insufficient evidence of negligence on the part of the vessel owner and granted a new trial to plaintiff on the issue of unseaworthiness on the ground that the jury's verdict was inconsistent.

6. On August 8, 1974, third-party plaintiff moved this Court for an order consolidating the main action of the plaintiff against the defendant with the two indemnity actions brought by the defendant and third-party plaintiff against the two third-party defendants. This motion was granted.

7. On October 9, 1974, a second trial was held before this court. On October 11, 1974, the trial jury, at the conclusion of the case, returned a verdict in plaintiff's favor in the amount of $42,900. In answers to special interrogatories submitted by the court, the jury indicated that it found the vessel unseaworthy. The jury further found plaintiff guilty of 25% contributory negligence. The jury also found that third-party defendant, International Terminal Operating Co., Inc., had breached its warranty of workmanlike performance and was liable to indemnify the third-party plaintiff. Finally, the jury found that the third-party defendant Court Carpentry and Marine Contracting Co. had not breached its warranty of workmanlike performance to the third-party plaintiff and was not liable to indemnify it.

8. Deponent respectfully submits that judgment non obstante verdicto should be granted to the defendant against the plaintiff on the ground that the

plaintiff failed to sustain his burden of proof on the issue of seaworthiness. Plaintiff's evidence that there was an approximate 4 inch space between the stowed I-beams upon which he was walking was not sufficient to meet his burden of proof as to unseaworthiness. The stow of the vessel was reasonably fit for its intended use in that it was reasonably safe and convenient for carriage at sea and for unloading at its destination. Plaintiff's own witnesss, Mr. Auletti, testified that it was usual and customary to find I-beams stowed in the manner in which they were stowed in the instant case.

9. Third-party defendant Court Carpentry & Marine Contracting Co. was not entitled to a jury trial. Court Carpentry waived its rights to a jury trial by failure to make a timely demand therefor. It is respectfully submitted by the third-party plaintiff that reviving a once waived right to a jury trial by the court is an abuse of its discretion. Furthermore, the finding of the jury that plaintiff was contributorily negligent compels a directed verdict for the defendant and third-party plaintiff against the plaintiff's employer Court Carpentry & Marine Contracting Co., as a matter of law. Third-party plaintiff is therefore entitled to judgment notwithstanding the verdict against the third-party defendant Court Carpentry.

WHEREFORE, deponent respectfully prays that an order be entered herein pursuant to Rule 50 of the

Federal Rules of Civil Procedure granting judgment in favor of defendant notwithstanding the jury verdict and granting judgment in favor of third-party plaintiff against third-party defendant Court Carpentry & Marine Contracting Co. and further granting to defendant such other and different relief as to this Court may seem just and proper.

/s/ Thomas F. Molanphy
Thomas F. Molanphy

Sworn to before me this
21st day of October, 1974.

Notary Public

MARGUERITE F. ZAMBITO
Notary Public, State of New York
No. 9703311
Qualified in Westchester County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1976

1437-181 41493

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA NEW YORK
12/3/74
ENTERED
BY:

574

MEMORANDUM OPINION OF
JUDGE MOTLEY DATED
NOVEMBER 26, 1974 ON
POST TRIAL MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE-DAMPFS-GES.,

Defendant and Third-Party Plaintiff

: 68 CIV. 3374

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC., and COURT CARPENTRY & MARINE CONTRACTING CO.,

Third-Party Defendants.

- x

APPEARANCES

SERGI and FETELL
By: Benjamin Sergi
44 Court Street
Brooklyn, New York 11201

SOLOMON J. COHEN
225 Broadway
New York, New York 10007

Attorneys for Plaintiff

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By: Thomas P. Holanphy
James H. Hazen
One State Street Plaza
New York, New York 10004

Attorneys for Defendant and
Third-Party Plaintiff

ALEXANDER, ASH, SCHWARTZ & COHEN
By: Albert V. Tosta
301 Second Avenue
New York, New York 10017

Attorneys for Third-Party Defendant
Court Carpentry and Moving Contr. Co.

FOGARTY, McLAUGHLIN & SEMEL
By: James D. Hockett
10 Rockefeller Plaza
New York, New York 10020

Attorneys for Third-Party Defendant
International Terminal Operating Co., Inc.

CONSTANCE BAKER MOTLEY, D. J.

Memorandum Opinion on Post Trial Motions

Plaintiff in this case, Jackson O. King, was a lasher employed by Court Carpentry and Marine Contracting Company. (Court Carpentry). On June 18, 1968, while in the employ of Court Carpentry, plaintiff went on board defendant Deutsche-Dampfs-Ges' vessel to lash steel booms and cranes to steel H beams. The beams had been stowed, side by side, longthwise the vessel on the deck of the No. 4 hatch. They had been so stowed by third-party defendant International Terminal Operating Company, Inc., (ITO), thereby creating a superdeck. On this superdeck ITO had stowed the various pieces of heavy equipment referred to above. It was plaintiff's job to lash with a heavy wire cable the various pieces of equipment to the steel beams. It is not disputed that plaintiff had to walk on the beams in order to perform his task. In so doing, plaintiff's left foot went into a space between two beams causing injury to his left knee. The seaworthiness issue, therefore, was whether the manner in which the beams had been stowed rendered the vessel unseaworthy, there being no issue of intended use.

Plaintiff sued the vessel owner claiming negligence on its part and unseaworthiness on the part of its vessel. The jury returned a verdict of $30,000 for the plaintiff. The jury found, in answer to special interrogatories, that defendant was negligent, that its negligence was the proximate cause of plaintiff's injuries, and that plaintiff was 50% contributorily negligent, thereby reducing plaintiff's recovery to $15,000. The jury, however, found that plaintiff had not sustained his burden of proving that defendant's vessel was unseaworthy. The court granted the vessel owner's motion for judgment notwithstanding the verdict on the issue of negligence and granted a new trial on the issue of unseaworthiness for the reasons set forth in its opinion of June 18, 1974.

Upon the new trial the jury returned a verdict for plaintiff in the amount of $57,200. It found, in answer to special interrogatories, that the vessel was unseaworthy, that this unseaworthiness was a proximate cause of plaintiff's injury, and that plaintiff was 25% contributorily negligent, thereby reducing his recovery to $42,900.

The vessel owner upon being sued by plaintiff had impleaded ITO and Court Carpentry, claiming that each would

liable over to it for breach of its implied warranty of workmanlike performance if plaintiff should prevail. Court Carpentry also brought a counterclaim against plaintiff claiming that plaintiff's own negligence would make plaintiff liable to it for any liability it might incur by reason of plaintiff's negligence.

Upon the first trial, the actions over had been severed and the case went to the jury on plaintiff's claims against the vessel and the vessel owner. Upon the new trial, plaintiff's claim of unseaworthiness against the vessel and the vessel's claims over were all tried together to the jury. However, at the end of the second trial plaintiff's claim was submitted by way of special interrogatories to the jury first. The two claims over were submitted, via special interrogatories, to the jury after it had answered questions on plaintiff's claim against the vessel. The court had earlier, at a pretrial conference, dismissed the counter claim of Court Carpentry against plaintiff on the ground that such a claim is barred as a matter of law. McLaughlin v. Trolleborgs Angfartygs A/B, 408 F.2d 1334 (2d Cir. 1969), cert. denied, 395 U. S. 946 (1969).

The jury found that ITO had breached its warranty of workmanlike performance (WWP) by the manner in which it had stowed the beams on the decks. However, the jury found that the vessel had not sustained its burden of proving that Court Carpentry had breached its WWP by failure to discover and remedy or cause to be remedied a dangerous condition.

At the conclusion of plaintiff's case and again at the conclusion of the jury's consideration of the claims over, the vessel moved for a directed verdict in its favor on the ground that the jury's finding of contributory negligence by the plaintiff entitled it to judgment against Court Carpentry as a matter of law. The court agrees and now holds that since the jury found that plaintiff had been 25% contributorily negligent, the vessel was entitled to a directed verdict in its favor against Court Carpentry at the end of the jury's consideration of plaintiff's claim against it. Mortensen v. A/S Glittre, 348 F.2d 383 (2d Cir. 1965); McLaughlin v. Trelleborgs Angfartygs A/B, supra; Hartnett v. Reiss Steamship Company, 421 F.2d 1011 (2d Cir. 1970).

The motion of Court Carpentry for an order dismissing the third-party complaint and directing a verdict

in its favor based upon the jury's favorable answer to the interrogatory noted above is therefore denied.

The motion of ITO for an order dismissing the claim over as to it on the ground that there was insufficient evidence to go to the jury on the issue of unseaworthiness and no evidence of its breach of its WWP is denied for the reasons set forth below.

The vessel also moved at the end of plaintiff's case and again at the end of the whole case for judgment in its favor against plaintiff, notwithstanding the jury verdict, on the issue of unseaworthiness. ITO joined in this motion. The vessel claims: 1) that there was insufficient evidence from which the jury could find that the manner in which the beams were stowed created an unseaworthy condition; and 2) such evidence as there was, was received from a witness who was not qualified to testify as to the proper and customary method of stowing beams.

The motion is denied on the ground that there was sufficient evidence from which the jury could find that the ship was unseaworthy because of the improper method by which the beams were stowed. See Ayena v. Clauss & Co., ___ F.2d ___ (2d Cir. 1974), (Index Nos. 73-2787, 74-1016,

decided October 1, 1974); Muzzo v. Rederi, A/S Wallenco, 304 F.2d 506 (2d Cir. 1962).

Upon the second trial plaintiff called as his witness Andrew Auletti, Court Carpentry's foreman, who was plaintiff's boss on board the vessel on the day of the accident. Mr. Auletti testified and the jury could have found that when he came on board the vessel he looked into the hatch where the accident occurred, did not see the space into which plaintiff later fell, or any other danger, and sent plaintiff and his co-worker down into the hatch to lash the heavy equipment to the beams. He testified that he had worked on board ships for 28 years and had seen H beams stowed on the decks of vessel "tight together" many times before.[1/] There was, therefore, sufficient evidence from which the jury could find that the H beams had not been properly stowed.

In addition, the vessel's quarrel with this testimony is that Mr. Auletti was not qualified as an expert to give testimony as to the custom and practice of stevedoring operations since he was not in the stevedoring business but in the marine carpentry and lashing business. The court rules that Mr. Auletti had sufficient expertise in view of his 28

years of experience on board ships to testify as to the manner in which such H beams have been and can be stowed on decks. See Avena v. Clauss & Co., supra, (Slip Op. at 5578.) "Besides, expert testimony may not even have been required since the behavior at issue. . .was susceptible to lay jurors' common sense evaluation as to its propriety." Avena v. Clauss & Co., supra, (Slip Op. at 5578.) The behavior at issue here was the stevedore's stowage of steel beams on the deck of a vessel upon which others were expected to walk. The vessel owner's duty to plaintiff was to provide a deck which was "reasonably fit for its intended use." Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 550 (1960). Whether the deck in this case was reasonably fit was manifestly a question for the jury.

Submit order on five day's notice.

Dated: New York, New York

November [illegible], 1974

CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTE

TR. pp 129, 171-172

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582

1637-181

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGMENT

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE DAMPFS-GES,

68 CIV. 3374

Defendant and
Third Party Plaintiff

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC. and COURT CARPENTRY & MARINE CONTRACTING CO.,

Third Party Defendants

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA NEW YORK
1/24/75
ENTERED
BY:

O R D E R

The issues in the above entitled action having come for trial before this court and a jury, and the jury having returned a verdict in favor of plaintiff, Jackson O. King, and against defendant shipowner in the amount of $57,200.00 on the basis of the unseaworthiness of the vessel, and the jury having further found that the plaintiff was 25% contributorily negligent, thereby reducing the plaintiff's recovery to $42,900.00; and the jury having found that third party defendant International Terminal Operating Co., Inc. (ITO) breached its warranty of workmanlike services to the shipowner; and the jury having found that the shipowner did not sustain its burden of proving that the third party defendant Court Carpentry had breached its warranty of workmanlike performance; and the shipowner having thereafter moved for judgment n.o.v. in its favor against plaintiff and ITO having joined in said motion,

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(AN EXTRACT OF THE MINUTES)

FPI-NI—6-21-73-2M-999

and due deliberation having been had thereon, it is hereby

ORDERED that said motions for judgment n.o.v. be and are hereby denied.

The shipowner having also moved for a directed verdict in its favor against Court Carpentry on the ground that the jury verdict of 25% contributory negligence on the part of plaintiff entitled the shipowner to judgment against Court Carpentry, as a matter of law, and due deliberation having been had thereon, it is

ORDERED that the said motion of the shipowner against Court Carpentry for judgment n.o.v. be and is hereby granted.

Court Carpentry having moved to dismiss the third party complaint and for a directed verdict in its favor, and due deliberation having been had thereon, it is

ORDERED that said motion be and is hereby denied.

It is further ORDERED that the Clerk of this Court be and is hereby directed to enter judgments as follows:

1. Plaintiff Jackson O. King have judgment against Deutsche Dampfs-GES, Defendant - third party plaintiff - in the sum of $42,900 together with costs and disbursements as taxed by the Clerk.

2. Deutsche Dampfs-GES - third party plaintiff - have judgment against International Terminal Operating Co., Inc. and Court Carpentry & Marine Contracting Co., third party defendants, jointly and severally for the full amount of plaintiff's recovery and, in addition thereto, reasonable counsel fees, costs and disbursements incurred in the defense of plaintiff's claim.

(AN EXTRACT OF THE MINUTES)

FFI-81—8-21-73-2M-999

3. The respective amounts of Deutsche Dampfs-Ges counsel fees and disbursements may be added to the foot hereof in sums to be agreed upon or, failing such agreement, in such sums as may be fixed by the court.

Dated: New York, New York

January 16, 1975

CONSTANCE BAKER MOTLEY
U. S. D. J.

JUDGMENT ENTERED

(AN EXTRACT OF THE MINUTES)

FBI-NI—8-21-73-[illegible]-999

TFM:PJ:6:1637-181

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL
OF DEFENDANT AND
THIRD PARTY PLAINTIFF

----------x

JACKSON O. KING,

Plaintiff,

- against -

DEUTSCHE-DAMPSS-GES.,

Defendant and Third
Party Plaintiff,

68 Civ. 3374

NOTICE OF PROTECTIVE
APPEAL

- against -

INTERNATIONAL TERMINAL OPERATING CO., INC., and COURT CARPENTRY & MARINE CONTRACTING CO.,

Third Party Defendants.

----------x

FILE COPY

2/24/75

S I R S :

WHEREAS, by notice dated February 10, 1975, the attorneys for third party defendant, Court Carpentry & Marine Contracting Co., appealed from those portions of the judgment entered in this action as awarded damages in favor of plaintiff and against defendant and third party plaintiff and indemnity in favor of defendant and third party plaintiff against third party defendant, Court Carpentry & Marine Contracting Co.,

PLEASE TAKE NOTICE that defendant and third party plaintiff, above named, hereby appeals to the United States Court of Appeals for the Second Circuit from so much of said judgment entered in this action on

the 22nd day of January, 1975, as awards damages in favor of plaintiff against defendant and third party plaintiff.

Dated: New York, New York
February 21, 1975

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
and Third Party Plaintiff

By Thomas A. Wolansky
A Member of the Firm
One State Street Plaza
New York, New York 10004

TO:

SERGI and FETELL, ESQS.
Attorneys for Plaintiff
44 Court Street
Brooklyn, N. Y.

SOLOMON J. COHEN, ESQ.
Attorney for Plaintiff
225 Broadway
New York, N. Y. 10007

FOGARTY, McLAUGHLIN & SEMEL, ESQS.
Attorneys for Third Party Defendant,
International Terminal Operating Co., Inc.
10 Rockefeller Plaza
New York, N. Y. 10020

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third Party Defendant,
Court Carpentry & Marine Contracting Co.
801 Second Avenue
New York, N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JACKSON O. KING,

Plaintiff,

-against-

DEUTSCHE-DAMPFS-GES.,

Defendant and Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC., and COURT CARPENTRY & MARINE CONTRACTING CO.,

Third-Party Defendants.

- x

NOTICE OF APPEAL OF THIRD PARTY DEFENDANT COURT-CARPENTRY & MARINE CONTRACTING CO.

68 CIV. 3374

NOTICE OF APPEAL

S I R S:

Notice is hereby given that COURT CARPENTRY & MARINE CONTRACTING CO., the third party defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in this action on the 22nd day of January, 1975, in favor of the plaintiff JACKSON O. KING and against the defendant DEUTSCHE-DAMPFS-GES in the amount of $42,900.00 and the said third party defendant further appeals from the judgment entered on January 22, 1975, in favor of

the defendant and third party plaintiff DEUTSCHE-DAMPFS-GES and against said third party defendant COURT CARPENTRY & MARINE CONTRACTING CO. in the amount of $42,900.00 jointly and severally with the third party defendant INTERNATIONAL TERMINAL OPERATING CO., INC., and from each and every part of said judgment.

DATED: New York, New York
February 10, 1975.

Member of the firm of
ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for third party defendant COURT CARPENTRY & MARINE CONTRACTING CO.

To: SERGI and FETELL, Esqs.
Attorneys for Plaintiff
44 Court Street
Brooklyn, New York

SOLOMON J. COHEN, Esq.
Attorney for Plaintiff
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New York, New York 10007

HAIGHT, GARDNER, POOR & HAVENS, Esqs.
Attorneys for defendant and
third party plaintiff
1 State Street Plaza
New York, New York

FOGARTY, McLAUGHLIN & SEMEL, Esqs.
Attorneys for Third-Party Defendant
International Terminal Operating Co., Inc.
10 Rockefeller Plaza
New York, New York 10020

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

PAUL KLEIN, being duly sworn, deposes and says:

That he is over eighteen years of age and is not a party to the within action. That on the 14th day of February, 1975, he served a true copy of the annexed

NOTICE OF APPEAL

on

SERGI and FETELL, Esqs.
Attorneys for Plaintiff
44 Court Street
Brooklyn, New York

SOLOMON J. COHEN, Esq.
Attorney for Plaintiff
225 Broadway
New York, New York 10007

HAIGHT, GARDNER, POOR & HAVENS, Esqs.
Attorneys for defendant and
third party plaintiff
1 State Street Plaza
New York, New York

FOGARTY, McLAUGHLIN & SEMEL, Esqs.
Attorneys for Third-Party Defendant
International Terminal Operating Co., Inc.
10 Rockefeller Plaza
New York, New York 10020

herein, by depositing a true copy of the aforesaid properly enclosed in a securely sealed and postpaid wrapper in a Post Office box under the exclusive care and custody of the Government of the United States, at 801 Second Avenue, in the Borough of Manhattan, City and State of New York, addressed to the aforesaid as above stated, and that said address(es) was (were) the address(es) designated by the said attorney(s) as the address(es) within the State of New York, where papers in this action might be served.

Paul Klein

Sworn to before me this
14th day of February, 1975.

Notary Public

JOSEPH ARTHUR COHEN
NOTARY PUBLIC, State of New York
No. 60-0741075
Qualified in Westchester County
Commission Expires March 30, 1976

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACKSON O. KING

Plaintiff

-against-

DEUTSCHE DAMPFS-GES

Defendant and
Third Party Plaintiff

-against-

INTERNATIONAL TERMINAL OPERATING CO. INC. and COURT CARPENTRY & MARINE CONTRACTING CO.

Third Party Defendants

68 Civ. 3374

NOTICE OF APPEAL OF THIRD PARTY DEFENDANT INTERNATIONAL TERMINAL OPERATING CO., INC.

S I R S :

PLEASE TAKE NOTICE that the Third Party Defendant INTERNATIONAL TERMINAL OPERATING CO. INC. appeals to the United States Court of Appeals from the Second Circuit from the judgment dated January 16, 1975 and entered in favor of plaintiff and Third Party Plaintiff in the United States District Court for the Southern District of New York, on January 22, 1975 and from each and every part of said judgment as well as the whole thereof.

Dated: New York, N.Y.
February 19, 1975

To:

SOLOMON J. COHEN, ESQ.
Attorney for Plaintiff
Office & P.O. Address
225 Broadway
New York, N.Y. 10007
WO-2-6543

FOGARTY, MC LAUGHLIN & SEMEL
Attorneys for Third Party Deft.
INTERNATIONAL TERMINAL OPERATING CO. INC. Office &
P.O. Address
10 Rockefeller Plaza, N.Y., NY
PLaza 7-8660

BY: Douglas A. Boeckmann
DOUGLAS A. BOECKMANN
A Member of the Firm

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SERGI AND FITTELL ESQS.
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Office & P.O. Address
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Third Party Plaintiff
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ALEXANDER, ASH, SCHWARTZ & COHEN ESQS.
Attorneys for Third Party Defendant
COURT CARPENTRY & MARINE CONTRACTING CO.
Office & P.O. Address
801 Second Avenue
New York, N.Y. 10017
889-0410

Service of 1 copies of this within
Appendix is admitted this
24th day of March 1975

Sergi & Fetell
ATTORNEY(S) FOR Plaintiff - Appellee

COPY RECEIVED BY
MANAGING ATTORNEY'S OFFICE
1975 MAR 24 PM 12:36

Attorneys for Defendant and Third-Party Plaintiff - Appellee - Appellant

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Attorney for Plaintiff - Appellee

John J Cox

Attorneys for Third-Party Defendant Appellant International Terminal Operating Co., Inc.

Fogarty McLaughlin & Semel
by Douglas A. Boehrman